

IN THE MATTER OF an Application Under Section 696.1 of the *Criminal Code*

B E T W E E N:

HER MAJESTY THE QUEEN

RESPONDENT

- and -

ROMEO PHILLION

APPLICANT

MEMORANDUM OF ARGUMENT

PART 1

INTRODUCTION

1. The deceased, Leopold Roy, was 48 years old at the time of his murder on Wednesday, August 9, 1967. He had been a fireman with the Ottawa Fire Department for twenty years. He was also the superintendent, and responsible for the maintenance, of the Churchill Court Apartments located at 275 Friel Street in Ottawa. In an investigation report, Detective McCombie, the original investigating officer, described the building as being “rented to mostly older people and single people who work.” Mr. Roy and his wife, Mildred Roy, lived in Apartment 1 in the basement of the four storey apartment building, and had resided there since 1956. The couple had no children. Mr. Roy was a francophone, but spoke English as well. He was 5 feet, 10 inches tall, and weighed 180 pounds. At the time of Mr. Phillion’s arrest in 1972, Mrs. Roy was working as a cleaner at the House of Commons.

Investigation Report of Huneault, Jan. 13/72, Record, Vol. 2, Tab 98, p. 1
Evidence of McCombie, Preliminary Hearing, Vol. 4, 338/30

2. On August 9, 1967, at approximately 2:45 p.m., Mildred Roy, who had been cleaning the apartment building, encountered a man in front of Apartment 14. He had his back to her. Mrs. Roy asked the man twice if she could help him. When the man turned toward her, Mrs. Roy, believing he could be a peddler or a prowler, called to her husband in the basement. The man ran past Mrs. Roy to the rear staircase of the building and headed downstairs. At the landing between the main and second floors, Mr. Roy caught up with the man and shoved him into a corner. After a brief scuffle, the man stabbed Mr. Roy once in the heart and fled the scene. Mr. Roy died within minutes of massive blood loss.

3. Leopold Roy was well-liked and respected by his colleagues at the No. 6 Fire Station. He was said to have approached his job with “hard-driving devotion.” According to Fire Chief Paul Larkin, Mr. Roy was a “fine fellow — quiet, well thought of by the men of the department.” He was an avid fisherman in his leisure time. Over 300 persons attended Mr. Roy’s funeral at the Sacred Heart Church in Ottawa on August 12, 1967. His casket was borne to the church on a black-draped fire truck with a full dress parade of honour.

Alan Holman, “Wife Saw Killer,” *Ottawa Citizen*, August 10, 1967, Record, Vol. 7, Tab 18, p. 2.

Mike Bryan, “Prowler Murders Ottawa Fireman,” *Ottawa Journal*, August 10, 1967, Record, Vol. 7, Tab 1, p. 4.

“Firemen Honor Slain Comrade” *Ottawa Journal*, August 14, 1967, Record, Vol. 7, Tab 7, p. 3

4. An intensive police investigation under the command of the investigating officer, Detective John McCombie, which the *Ottawa Journal* described as “a province-wide dragnet,” ensued as a result of Mr. Roy’s murder. The Ottawa Police were looking for a suspect whom they described as

being “30 to 35 years old, about five feet two inches tall, with black curly hair and wearing a dark suit.” Mrs. Roy told the police that the intruder looked like someone she knew, a man named Fernand Kirouac. Mr. Kirouac allowed the police to take his photograph. P.C. Cederberg of the RCMP, a police artist, then sat with Mrs. Roy and made modifications to the photograph to make the man look younger than Mr. Kirouac. On August 10, this composite picture of the suspect was released to the media.¹ Twenty officers searched the area of 275 Friel Street for evidence but did not find the murder weapon. Squads of detectives worked around the clock on the case. More than a dozen men, including Romeo Phillion, were questioned in the days and months following the murder. Mr. Phillion himself was arrested by Detective McCombie in New Liskeard on August 13, 1967, returned to Ottawa for investigation and released on August 15, 1967. Photo lineups and at least three identification parades (Mr. Phillion was in one of them) were conducted. It is now known that, in this time frame, Mr. Phillion’s whereabouts at the time of the murder were established by Detective McCombie (he was in Trenton, some 240 kilometres from Ottawa), and he was cleared as a suspect..

Mike Bryan, “Prowler Murder’s Ottawa Fireman,” *Ottawa Journal*, August 10, 1967, Record, Vol. 7, Tab 1, pp. 1-2.
 “Scour city for killer: Intruder stabs man in building,” *Ottawa Citizen*, August 10, 1967, Record, Vol. 7, Tab 2, p. 1.
 Investigation Report of McCombie, Aug. 10/67, Record, Vol. 2, Tab 14
 Evidence of P.C. Kearney, Preliminary Hearing, Vol. 5, 440/10 to 454/40
 Evidence of P.C. Cederberg, Preliminary Hearing, Vol. 5, 432/20 to 444/10

5. An Inquest was held into Mr. Roy’s murder on November 6, 1967 at the Ottawa Police Station. A number of witnesses were called, including Mrs. Roy, Dr. Tolnai, Mrs. Robitaille and Detective McCombie. The jury recommended a reward be offered for information leading to the apprehension and conviction of the assailant. As a result, a Notice of Reward was issued:

¹ This evidence was not led before the jury, and the composite was not shown to the jury.

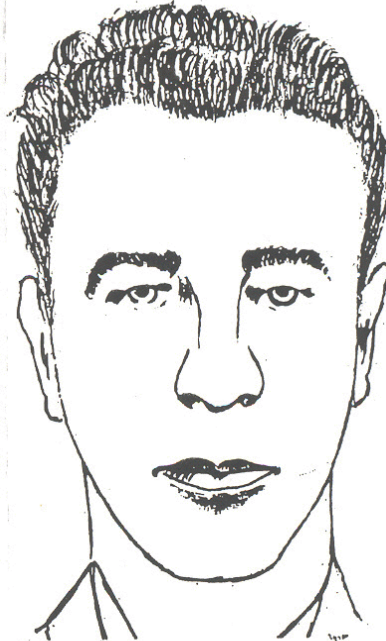
NOTICE OF REWARD

\$ 2,500 REWARD

At 2:45 P.M., August 9th, 1967, Leopold Roy, superintendent of the apartment building at 275 Friel Street in Ottawa, was fatally stabbed by a prowler whom he was attempting to detain for police.

DESCRIPTION AND ARTIST'S CONCEPTION OF WANTED MAN

Male
 White
 Age, 25-30 years
 Weight, 130-140 lbs.
 Height, 5'2"-5'6"
 Hair, black and curly
 Complexion, dark (looked as though he needed a shave)
 Clothing, dark suit; had an old torn brown wallet, possibly alligator skin
 Believed to be French-speaking



The Board of Commissioners of Police have unanimously agreed to pay \$2,500.00 for information leading to the arrest and conviction of the person responsible for this crime. The identity of anyone supplying information will be kept in strictest confidence. Telephone or telegraph this department, collect.

Ottawa Police Department,
 Ottawa, Ontario,
 telephone 232-3711


 J.A. Cavan, K.M.,
 Chief of Police.

6. The police investigation into Leopold Roy's murder stagnated. The murder weapon was never found. The file remained open for the following four and a half years. By 1972, the case was cold. No arrests had been made, and no new evidence had been collected. The identity of Mr. Roy's murderer remained a mystery.

7. Romeo Phillion was arrested in Ottawa on the morning of January 11, 1972 for his involvement in the attempted robbery of a taxi driver in the Ottawa area. At noon, after he had given police a statement on that charge, and as he was being escorted by Detective Huneault to the cellblock, Phillion confessed to Mr. Roy's murder. He gave a signed statement to Detective Huneault and his partner, Detective Nadori. Following the statement, Detectives Huneault, Nadori, and a superior officer, Detective Sgt. Norton, took Phillion twice to 275 Friel Street to have him reconstruct the homicide.

8. At 8:39 p.m., following his return from the second trip to Friel Street, Mr. Phillion was charged with non-capital murder. Detective Huneault became the officer in charge of the case. Mr. Phillion appeared before Judge Hutton of the Provincial Court and was remanded for a mental health examination. On July 18, 1972, following a preliminary inquiry, he was committed to stand trial.

Memo from M. Lindsay to B. Parnega, Aug. 8/72, Record, Vol. 15, Tab 29

9. Mr. Phillion's trial was held in Ottawa, in the Supreme Court of Ontario before Madam Justice Van Camp, and a jury. Mr. Malcolm (Mac) Lindsay appeared for the Crown, and Mr. Arthur Cogan appeared for the defence. The trial took three weeks. After a *voir dire*, Van Camp J. admitted his confession into evidence. Mr. Cogan did not know that in 1967 his client had been cleared of any involvement in the crime. On November 7, 1972, the jury returned a verdict of guilty

of non-capital murder. Mr. Phillion was sentenced to life imprisonment.

10. On July 30, 1974, Mr. Phillion's appeal to the Ontario Court of Appeal was dismissed. He was granted leave to appeal to the Supreme Court of Canada on December 19, 1974. His appeal was heard by the court on December 1, 1976, and dismissed on March 22, 1977. His case remains the leading authority on the inadmissibility of polygraph evidence. He continues to serve his life sentence in Bath Institution.

1. ROMEO PHILLION'S LIFE (1939 - 2003)

(a) Childhood (1939-1956)

11. Romeo Phillion was born into a large francophone family on April 29, 1939 in Cobalt, Ontario. His father, Wilfred, who worked in the mines, was an alcoholic, and beat both his wife, Yvonne, and his children. Romeo had nine brothers and sisters, one of whom was stillborn. He and his twin brother, Donald, were the fourth eldest children in the family. He ran away from home several times. Following an episode in which his father assaulted Donald, the twins were placed in foster care.

12. In 1950, at the age of 10, Romeo and Donald were sent to St. Joseph's Training School in Alfred, Ontario. While at St. Joseph's, Romeo suffered severe physical and sexual abuse at the hands of the Christian Brothers who ran the school. He left the school at the age of 15, having attained a grade six education.

(b) Youth and Adulthood until his Arrest for Murder (1955 - 1972)

13. On December 8, 1955, at the age of 16, Romeo Phillion was convicted of theft, contrary to Section 280 of the *Criminal Code*. It was his first conviction. He spent the next several years drifting through Ontario, working in various parts of Northern Ontario, in Toronto, and in Ottawa. He was frequently in trouble with the law. His criminal record came to include 18 convictions for offences such as Robbery, Theft, Assault, Loitering, Theft of Auto, Breaking and Entering, Procuring, Living on the Avails of Prostitution and Assault Causing Bodily Harm. His twin brother, Donald, was also in trouble with the law. By the time of Romeo's arrest in January, 1972, Donald was already serving a life sentence for an unrelated murder.

14. Phillion was engaged in two relatively long term relationships during these years. Between 1966 and 1968, he lived common law with Gail Brazeau. Their relationship apparently ended in 1968 when he was convicted of living on the avails of her prostitution. Phillion was also involved with a transvestite, Neil Miller, who was a troubled young man with a history of drug abuse. Their relationship ended in January 1972, after Phillion's confession and after Miller gave statements to police incriminating Phillion in Mr. Roy's murder.

15. Following his arrest for the murder, Phillion was held in custody at the Carleton County Jail, awaiting trial. At his first Provincial Court appearance, an order was made for him to be examined for fitness to stand trial. Dr. Blair examined him on January 13, 1972 and testified in Court on January 14 that Phillion was fit to stand trial. In his report, dated January 24, 1972, Dr. Blair wrote:

“In-so-far as the murder charge is concerned [Phillion] went on to say that he is a lonely type and he wanted the publicity and he wanted to send “the cops on a wild goose-chase”. He also went on to say how he likes to “make stories up” -- “to get some attention”.

This prisoner although not mentally ill, has a personality disorder much in keeping with his brother’s. This personality disorder would be characterized by anti-social traits and of course sexual deviation. He is certainly a bit more dramatic and self-confident than his brother and more readily admits to how he “likes to make up stories.”

Report of Dr. Blair, Jan. 24/72, Record, Vol. 14, Tab 24

16. Before his trial, Romeo was twice transferred to psychiatric hospitals, the first time on April 21, 1972 to the Queen Street Mental Health Centre, and the second time on September 11, 1972 to the Ontario Psychiatric Hospital in Penetang. As regards the latter transfer, Mr. Phillion’s first trial date had been set for September 11, 1972. On that date, Mr. Cogan advised Mr. Justice Fraser in the Supreme Court of Ontario that, since his arrest, Mr. Phillion had:

- attempted suicide during the preliminary hearing,
- swallowed razor blades in another suicide attempt in the summer of 1972,
- on August 22, swallowed three fish hooks attached to a line which had necessitated major surgery.

Mr. Cogan told the Court that two doctors, Dr. Blair and Dr. Leduc, were both concerned about Mr. Phillion’s mental and physical well-being. Fraser J. adjourned his trial so that Mr. Phillion could be further examined.

Crown’s handwritten notes of Sept. 11/72, Record, Vol. 12, Tab 22
See Investigation Report of Huneault, Sept. 11/72, Record, Vol. 2, Tabs 123, 124 and 125

17. He was at Penetang until October 5, 1972. In a report dated May 31, 1972, from the Queen Street Mental Health Centre, Dr. Wayne, a staff psychiatrist, wrote:

“An admission for assessment was done at the Lakeshore Psychiatric Hospital from March 14 to April 22, 1956 without positive findings. While incarcerated at the Guelph Correctional Centre, the psychologist reported, “simple adult maladjustment with features of little responsibility and little conception of good social and moral values. A weak and immature personality. Otherwise is not an institutional problem. Prospects for lasting rehabilitation at present very doubtful.” The Hospital Officer at Kingston Penitentiary reports a somewhat effeminate, inadequate inmate who was never regarded as psychotic. His problems were in terms of his adjustments.

This man gave a long history of suicidal attempts since about 1967. He has slashed his arms, tried to hang himself, run from the Police expecting to be shot etc. While being held in the Ottawa Jail, he has swallowed several pieces of glass and razor blades. Statements that he wished to die and repeated threats that he will kill himself have been made.”

.....

In our opinion

3. he is not considered dangerous to himself. His acting out behaviour is seen as an attention seeking device, done on impulse. Although he really doesn't wish to die, he may one day be self destructive without the intent to do so.

4. he is considered dangerous to others. He boasts of past events and makes threats to others in a dangerous way.

.....

6. this man displays the characteristics of the typical anti social pathological personality, an inability to form lasting interpersonal relationships, inability to profit by experience, impulsiveness, irresponsibility, persistently and inadequately motivated anti social behaviour, inability to accept blame, peculiar inability to distinguish between truth and falsehood, incapacity for love and a persistent pattern of self defeat. He lacks judgment, foresight, ordinary prudence and fits into the predominantly aggressive level. His conduct confirms his lack of internal impulse controls being often violent and of undependable nature. The intensity and fierceness seem to be related to feelings of hate and frustration which have their roots in his instinctive life. Ill-adapted personalities like this often turn to drugs. There is a coldness, a hardness, an insensibility to the feelings of others and an absence of remorse. May we suggest a re-assessment of this man before he is ever released to society. He will likely not learn from experience in prison and may some day be available for release, no safer than he was before.”

(c) Phillion's Imprisonment (1972 - 2003)

18. After his murder conviction, due to concerns that he was suicidal, Phillion was transferred to the Regional Psychiatric Centre in Kingston.

19. On September 18, 1973, following a change of venue of the case from Ottawa to Toronto, Phillion pleaded guilty before Graburn J. in County Court to attempted robbery for his role in the Ottawa taxi robbery. He was sentenced to 12 years in prison, concurrent with his life sentence.²

20. Phillion stayed at the Regional Psychiatric Centre for seven years following his murder conviction. He has since served his sentence in Kingston, Warkworth, Joyceville, Collins Bay, Frontenac, and Bath Penitentiaries.

21. While at Frontenac, Phillion left the institution and walked into Kingston where, by passing a threatening note to a teller that he had a gun, he robbed a bank of between two and three thousand dollars. He then took a taxi back to Frontenac and gave the money to other inmates. None of the stolen money was recovered. Phillion pleaded guilty to the robbery in the Ontario Court (General Division) in Kingston on April 9, 1990, and was sentenced to 4 years concurrent with his life sentence.

22. Mr. Phillion has been at the medium-security Bath Institution since 1996.

² Phillion's criminal record suggests that he was convicted of Attempted Theft on September 18, 1973. This is in error; he was, in fact, convicted of Robbery.

2. THE EVENTS LEADING UP TO MR. PHILLION'S APPLICATION TO THE MINISTER OF JUSTICE UNDER S. 696.1

23. On January 11, 1972, between 3:10 and 3:45 p.m., Romeo Phillion signed a typed confession to Mr. Roy's murder. At 10:28 p.m. that night, after being booked into a holding cell in the Ottawa police station, he denied committing the murder by recanting to P.C. Couture, a custodial officer. Since that time, more than 31 years ago, Mr. Phillion has been adamant that he did not kill Leopold Roy, and that he was not in Ottawa on August 9, 1967. He refuses to apply for parole on principle, believing that conditional release is for the guilty, not the innocent. For example, on January 11, 2002, the 30th anniversary of his arrest for the homicide, the following discussion at a parole hearing with Sheila Hendrickson of the Parole Board occurred:

SH: Okay. Um, and what, what I'm getting at is that, is that you've been incarcerated for an extremely long period of time.

RP: Yes. Too long.

SH: And what you're looking at is full parole. So, we have to take that into consideration.

RP: I'm not looking for no full parole...

SH: Okay.

RP: ...I'm not looking for parole at all.

SH: All right.

RP: Parole is for the guilty, not the innocent...

SH: Okay, all right.

RP: Okay?

SH: So, you...

RP: And I'm very strongly on that, and that's, that's true.

SH: Okay, so..

RP: That's a fact.

SH: ...why are you here?

RP: I am here to discuss my case to you, that you people should have looked into this case years ago. At least three to four times while I'm in front of the Parole Board. Then nobody listened, nobody listened.

Transcript, Parole Hearing, Jan. 11/01, Record, Vol. 15, Tab 4

24. In 1991, Mr. Phillion began writing to the Minister of Justice to have his case reopened. He enlisted the assistance of J. Douglas Crane, the lawyer who had represented him on both of his appeals. Mr. Crane made a request for the original Ottawa Police file pursuant to the *Access to Information Act*, R.S.C. 1985, c. P-21. He received a file which had been heavily edited. Many reports, were blocked out entirely, with 19(1)(d) scrawled in magic marker as the reason for the exclusion.³ Mr. Crane also hired a private investigator, Jack Parish, the President of *Summit Investigations Services Inc.*, to investigate Mr. Phillion's claims. Based primarily on Phillion's letters and submissions by Mr. Crane and Mr. Parish, Michael Dale, counsel with the Criminal Conviction Review Group at the Department of Justice, prepared a draft investigation brief in 1996.

Draft Investigation Brief, Criminal Conviction Review Group, 1996, Record, Vol. 15, Tab 15

³ Section 19(1)(d) of the *Privacy Act*, R.S.C. 1985, c. P-21 reads:

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any personal information requested under subsection 12(1) that was obtained in confidence from

...

(d) a municipal or regional government established by or pursuant to an Act of the legislature of a province or an institution of such a government.

25. In 1997, Romeo Phillion contacted the *Innocence Project*. At the request of the *Project*, further action by the Department of Justice on Phillion's application to the Minister of Justice was halted.

26. In 1998, a brown manilla envelope, containing Ottawa Police reports from his Corrections Canada security file, was given to him by his parole officer, Roly Carrier. The file included a report dated April 12, 1968, at 8:00 p.m. by the investigating officer, Detective McCombie, which stated that Phillion had been in Trenton, Ontario, less than two hours before the murder.⁴ In the same report, McCombie concluded that it was impossible for Mr. Phillion to have returned to Ottawa in time to have killed Mr. Roy and, hence, he did not commit the murder. The report also referred to interviews conducted by McCombie with four material witnesses, Paul and Denise Barbe, and Marie and Gail Brazeau, which materially contradicted evidence called to prove at Mr. Phillion's trial that he was in Ottawa at the time of the murder. Mr. Phillion forwarded the contents of the envelope to the *Innocence Project*.

27. On February 5, 1999, Professor Dianne Martin and two students, Zuzanna Fernandes and Stacey Taraniuk, went to Ottawa to speak to Detective McCombie. By this time he was retired from the Ottawa-Carleton Police Service, and was a member of the Ottawa-Carleton Police Services Board. They showed McCombie his April 12, 1968 report. McCombie said he recalled having

⁴ This was the first time in 28 years Mr. Phillion had a chance to see the contents of the April 12, 1968 report. A copy of the report had been given to him *circa* 1995 pursuant to the access to information request made on his behalf, but all contents of significance had been blacked out. The two documents appear to have been received from the same source. Both have the same CSC coding on the bottom right-hand side of the page.

See Record, Vol. 11, Tabs 1 and 2

travelled to Trenton, and having spoken with the service station operator. He remembered that the owner gave him the radio that Phillion had used as collateral for the work that they had done on his car.

28. In 1999, the *Innocence Project* took over the Section 690 Application already filed on Mr. Phillion's behalf by his previous counsel, Mr. Crane. In January 2000, disclosure of some police investigation reports was provided by the Ministry of the Attorney General. Requests for physical exhibits, witness statements and the Crown brief were unsuccessful. Howard Leibovich, the Crown assigned to the case, advised that no more information was available.

29. On November 8, 2001, Mr. Phillion's story was made public for the first time. Stories on his case ran in the *Globe and Mail*, the *Ottawa Sun*, the *Ottawa Citizen*, *Le Droit*, and other papers. Radio-Canada's news magazine show, *Zone Libre*, broadcast a one-hour documentary, which was condensed, translated into English and aired on the CBC Television's *The National* the following week.

30. In December 2001, the *Innocence Project* retained James Lockyer, a director of the *Association in Defence of the Wrongly Convicted (AIDWYC)*, to act as counsel to the *Innocence Project* by preparing Mr. Phillion's Section 696.1 application.

31. In January 2002, as a result of further inquiries by counsel, the Archives of Ontario confirmed it was in possession of the "Crown Investigative File" on the Roy murder. Murray Segal, the Deputy

Attorney General of Ontario, confirmed that there were over 700 pages of documents to be disclosed. In February, 2002, James K. Stewart, General Counsel at the Crown Law Office, Criminal, was assigned to the case. In the ensuing months, Mr. Stewart provided copies of materials that had been retrieved from the archives. On August 1, 2002, we attended at the Archives of Ontario with Mr. Stewart and, at that time, reviewed the contents of their files.

32. Commencing in April, 2002, Dr. Gudjonsson, a world renowned expert on false confessions, and Dr. Turrall, a Toronto psychologist, were retained to review the case. In September, 2002, Dr. Gudjonsson came to Canada. He spent a day with Romeo Phillion, had a meeting with his sister, conducted a thorough review of the case, and was aided by Dr. Turrall's psychological assessment of Mr. Phillion. In his conclusion to his 35 page report, he wrote:

“Having carefully considered this case, I am in no doubt that it is unsafe to rely on the confession Mr. Phillion made to the police in 1972 concerning the murder of Mr. Roy. The confession, without good independent corroboration, is inherently unreliable due to Mr. Phillion's psychological problems and psychopathology at the time.”

Report of Dr. Gudjonsson, Record, Vol. 16, Tab B

33. In preparing this application, materials and information from the following resources have been used and reviewed:

- the New Liskeard Police Department
- the Ministry of the Attorney General
- the Archives of Ontario
- the Correctional Service of Canada
- the Chief Coroner's Office for Ontario
- the Department of Justice, Convictions Review Group
- Mr. Phillion's trial counsel, J. Arthur Cogan, Q.C.
- one of Mr. Phillion's appellate counsel, J. Douglas Crane

- the Penetanguishene Mental Health Centre
- the Supreme Court of Canada archives
- the archives of the Centre of Forensic Sciences
- printed media reports from 1967 and 1972.

Several people have been located and spoken to who were involved in the case in the 1967 to 1972 period. These include:

- Detective McCombie, who was interviewed on February 5, 1999,
- Malcolm (Mac) Lindsay, the Crown at Mr. Phillion's trial, whom Mr. Lockyer and Professor Martin have contacted in writing and by telephone,
- Dr. Arboleda, a defence expert psychiatrist at Mr. Phillion's trial, with whom Mr. Lockyer has been in correspondence and to whom he has spoken by telephone,
- Dr. Girodo, a defence expert psychiatrist at Mr. Phillion's trial, with whom Mr. Lockyer has been in correspondence and to whom he has spoken by telephone,
- Arthur Cogan, Mr. Phillion's trial counsel, who has met us on several occasions, and with whom we have corresponded – Mr. Cogan also gave us the remnants of his file that he found in his own archives.

Detective Huneault, Neil Miller, Dr. Tolnai and Mrs. Roy are all known to be deceased.

34. No physical evidence from the case has been found. In a letter to Howard Leibovich dated July 26, 2000, Ottawa Police Chief Vince Bevan stated that a thorough search of the Property Department and the police filing system had not produced any exhibits. This includes the clothing that Phillion was wearing when arrested on August 13, 1967 by Detective McCombie in New Liskeard which had been lost by the time of the preliminary hearing in 1972. There are also a number of documents that have not been located including the following:

- the original reports of Dr. Arboleda and Dr. Girodo (they could not remember if they had prepared reports),

- a copy of the August 8, 1967 traffic ticket given to Romeo Phillion,
- the notes of the officers involved in the investigation of Mr. Roy's murder in 1967 and 1972, including Detective McCombie (there was a portion of Detective Sgt. Norton's notes in the archives),
- details of any statements given by Phillion to the Ottawa Police and/or the New Liskeard police between August 13 and 15, 1967,
- the Crown brief on Mr. Phillion's taxi robbery charge,
- Mr. Phillion's statement to the police on the robbery charge which was made immediately before his confession to Mr. Roy's murder,
- any police reports regarding the robbery,
- reports on the housebreaking charge on which Phillion was arrested in New Liskeard.

In addition, it seems that numerous police investigation reports from the homicide investigation are missing. Missing reports include those from 1967 that would provide the source information for McCombie's April 12, 1968 report, including Phillion's statements wherein he related how his car broke down near Trenton on August 9, and the statement of the service station operator who confirmed this information.

Chief Bevan letter, July 26/00, Record, Vol. 3, Tab A, 34
Chief Ford letter, Nov. 17/97, Record, Vol. 3, Tab A, 8
Evidence of McCombie, Preliminary Hearing, Vol. 4, 389/30

35. It should be noted at the outset that virtually no reliance has been placed on Mr. Phillion's memory for information in preparing this brief. As will be seen, he is not a reliable source of information and has, over the years, provided numerous contradictory versions of the events of August 9, 1967. His unreliability, it will be argued, also contributed in a negative manner to his defence at his trial, and contributed to his counsel's lack of knowledge of many of the facts at the time.

PART 2

THE EVIDENCE HEARD BY THE JURY

1. A DESCRIPTION OF 275 FRIEL STREET

36. 275 Friel Street was a four storey apartment building, with a basement, a main floor, a second floor and a third floor.⁵ There were 19 apartments in the building. The front entrance of the building photographed as follows (Exhibit 3 at trial):

⁵ There was some confusion at the trial because the witnesses gave differing descriptions of the floors, and the stairwells between the floors.

37. The floors were divided as follows:⁶

- *in the basement*, there were three apartments, No. 1 (in which the Roys lived), No. 2 and No. 3. The furnace room was towards the back of the basement. In the centre of the basement area was a set of stairs, part of the central stairway, that led to the front door of the building. The central stairway continued to the upper floors. Back stairs led from the basement up to the main floor and the upper floors. The back stairs between each floor consisted of two flights of stairs with a landing between each flight. On the back stairs, midway between the basement and the main floor, there was a back door that led out of the apartment building.

Diagram of basement prepared by a City Engineer

⁶ Please refer to the CD-ROM included in Volume 15, Tab 6 of the Record for photographs and a video of 275 Friel Street.

- *on the main floor* (also referred to in the evidence as the “first floor”), there were seven apartments, Numbers 4 to 10. The front doors, which opened from Friel Street and were always kept locked, and to which the tenants had a key, led into seven steps which led up to the foyer. In order to enter the front of the building, a visitor had to press a buzzer to the apartment that he/she wanted to go to, and the tenant could then press a button in his/her apartment to let the visitor in. It is unclear whether there was a voice intercom in 1967 but there is one today. There were two flights of stairs servicing the building, the central stairs on the main floor, which came up from the basement and led to the upper floors, and the back stairs which came up from the basement, continued to the third floor, and were on the northeast side of the building.

Diagram of the main floor prepared by a City Engineer

- *on the second floor*, there were eight apartments, Number 11 to 19 (but no Number 13), as well as the main staircase, and the back stairs.

Diagram of the second floor prepared by a City Engineer

- there was a *third floor* of apartments, and a *fourth floor* which contained only a washroom.

Exhibits 2(a), 2(b), 2(c), Record, Vol. 10, Tab 19

Evidence of McCombie, Inquest, 34/10

Evidence of McCombie, Preliminary Hearing, Vol. 4, 378/40 to 379/10

Evidence of Tinman, Vol. 3, 609/15 to 616/30

See Evidence of Detective Sgt. Norton, *Voir Dire*, Vol. 2, 393/30 to 395/30

38. Both the central and back staircases consisted of two flights of stairs between each floor, with a small landing where the stairs changed direction. There was, therefore, a landing between the basement and the main floor, and the main floor and the second floor, on both sets of stairs.

2. THE EVENTS LEADING UP TO MR. ROY'S MURDER

39. Wednesday, August 9, 1967, was a bright sunny day. Mr. Roy returned home to his apartment in the basement of 275 Friel Street at 8:00 a.m. after working the night shift at the Fire Department.⁷ He did not go to bed. Between 1:45 and 2:00 p.m. (according to Mrs. Roy) and 3:00 p.m. (according to Mr. Herbert), Christopher Herbert, the oil burner serviceman, who worked for Globe Parfield, entered through the unlocked back door onto the landing of the back stairs between the main floor and basement and walked down one flight of stairs into the basement of the building.⁸ Mr. Roy opened the furnace door in the basement for him, and Mr. Herbert began to clean the furnace. Mr. Roy watched and they talked.

⁷ He was due to return to work that evening at 6:00 p.m.
Willsay of District Chief Wilson, Record, Vol. 13, Tab 15

⁸ The back door leading into the basement was regularly left unlocked in the daytime.
Evidence of Mrs. Roy, Vol. 3, 658/20

Evidence of C. Herbert, Vol. 4, 762/40 to 766/30
Evidence of Mrs. Roy, Vol. 3, 655/20 to 661/30
Evidence of P.C. Storey, Vol. 3, 619/40

40. When Mr. Herbert arrived, Mrs. Roy went upstairs with a mop and duster to clean the common areas of the building, including the staircase railings. She first cleaned on the main floor, which took her about five minutes, and saw no one there. She continued up the main staircase to the second floor and dusted that floor for another five minutes. She then dusted the third floor, and cleaned the washroom, which included a laundry room, on the fourth floor. She returned down the back stairs, mopping and dusting as she went, until she reached the second floor. She began to clean areas on the second floor that she had missed on the way up.

Evidence of Mrs. Roy, Vol. 3, 659/35 to 664/30

41. As she came into the second floor hallway, she saw a man standing with his back to her outside Apartment 14, rented by Mrs. Ellen Arkison.⁹ A photograph looking towards Apartment 14 was filed as Exhibit 6 at the trial.

⁹ In the police reports and at the Inquest, Mrs. Arkison is variously referred to as Mrs. Artison, Mrs. Arkinson and Mrs. Atkinson.
Investigation Report of Huneault, Jan. 13/72, Record. Vol. 2, Tab 98
Investigation Report of Huneault, Jan. 14/72, Record. Vol. 2, Tab 101

Photograph taken by P.C. Storey of the second floor looking towards Apartment 14

42. Mrs. Roy knew that Mrs. Arkison was not home and that she was in hospital. Mrs. Roy continued moving in the man's direction as she cleaned. He was shuffling between Apartment 14 and the apartment next to it, Apartment 12, always with his back to her, and was moving his arms in front of his body. As she came closer to him, Mrs. Roy asked twice if she could help him. He turned around when she asked for the second time. He had no gloves on and was holding a wallet. He "blurred" something to her. She had never seen the man before and thought he was a peddler or a prowler.

Evidence of Mrs. Roy, Vol. 3, 664/30 to 673/20; Vol 4, 747/15-40

43. Mrs. Roy yelled for her husband from the top of the main stairs. The man ran past her down the second floor hallway to the back stairs. She followed him and saw him jump the railing at the landing between the second and main floors. Her husband, who had come up the back stairs, caught the man at the landing on the back stairs between the main and second floors, pushed him into the corner beside a radiator and held him by the shoulders. He told his wife, "You know what to do". She heard the man say that he was doing nothing wrong, and her husband respond, "How come you are running if you didn't do anything wrong?" Mrs. Roy descended the main staircase from the second to the main floor, and then went down the back staircase to Apartment 2 (the door was unlocked) in the basement and called the police. She did not look up as she went down the back staircase but heard her husband yell, "Don't call the police; call a doctor".¹⁰

Evidence of Mrs. Roy, Vol. 3, 696/20 to 700/30; Vol. 4, 748/20-40
Exhibit 10 (photograph), Record, Vol. 10, Tab 12

¹⁰ At the Coroner's Inquest, Mrs. Roy testified that as the intruder fled to the back stairs, she went down on the main stairway to the main floor and then went over to the back stairs. At this time, she looked up and saw her husband holding on to the intruder.
Coroner's Inquest, 12/30-45

44. Before going into Apartment 2, she saw her husband.

“...was on the post, hanging on the post. He had his hand to the post on the back railing, and his left hand to his heart. He didn’t come down the seven steps; he bled to death right there. He started to bleed as soon as he let his hand go.”

After calling the police, she returned to the basement hallway. She saw Mr. Herbert move her husband, who was “halfway fallen down the stairs”, into the corner by the furnace door. She ran for some cloths to wash his face.

Evidence of Mrs. Roy, Vol. 3, 700/30 to Vol. 4, 702/40

45. Mrs. Eugene Robitaille lived in Apartment 7 on the main floor. Around 3:00 p.m., she heard Mrs. Roy screaming. She ran out of her apartment, and saw a man trying to get out the front door. He was fumbling with the latch. She was four feet way from him. She testified:

“I didn’t see his face, I saw the back of his silhouette, then when I looked down I saw Mrs. Roy down at the bottom of the stairs and she was yelling and screaming. She said, “Call the police, Mrs. Robitaille”, so I ran back into my apartment and called the police.”

When Mrs. Robitaille came back out of her apartment, the man had gone. She went down the main staircase and saw Mrs. Roy wiping her husband’s face with a cloth. She took the cloth from Mrs. Roy and then gave it to a man (presumably Mr. Herbert) who came out of the furnace room. She then took Mrs. Roy into Apartment 1.

Evidence of E. Robitaille, Vol. 4, 778/30 to 781/20

46. Mr. Herbert, the serviceman, had a different memory of events than that of Mrs. Roy. He testified that he was in the furnace room with Mr. Roy for about twenty minutes when he heard Mrs. Roy run downstairs yelling in an agitated state. She ran into her apartment and closed the door. He testified:

“I had my back turned, but I knew it was her because I knew her voice well and Mr. Roy said, “My wife has just gone in the room there. She says there is somebody upstairs”, and I said, “Do you want me to go up with you?”, and he said, “No, I’m all right”, and I said, “Take a broom handle”, and he said, “No. I’m all right”, and I said, “All right. That’s your business then”, and I went back and finished working on the furnace.”

Mr. Herbert finished working and, as he exited the furnace room, saw Mr. Roy lying horizontally on the back stairs, head first, with his feet above him. He was not making any sound. He dragged Mr. Roy down the remaining steps and saw that he was covered in blood. He pulled up Mr. Roy’s t-shirt and saw a stab wound below his heart. He was lifeless.

Evidence of C. Herbert, Vol. 4, 762/40 to 768/70, 771/20 to 772/30

47. Mr. Herbert banged on Mrs. Roy’s apartment door. He could hear her sobbing through the door but she did not open the door. He went out to his truck and radioed his company to call the police. He returned inside and saw a woman (presumably Mrs. Robitaille) who gave him a rag which he put against Mr. Roy’s wound. He remained at the scene until members of the Fire Department, and some police officers arrived.

Evidence of C. Herbert, Vol. 4, 766/30 to 771/20

48. Detective McCombie of the Ottawa Police Department, who became the officer in charge, arrived at the scene through the rear door that entered onto the back stairs between the basement and the main floor at approximately 3:00 p.m., after members of the Fire Department had already arrived. One police officer, P.C. Johnson, was already there. Mr. Herbert, Mrs. Roy and Mrs. Robitaille were also present. He spoke to Mrs. Roy and obtained an account of what had happened. He also spoke to Mrs. Robitaille.

Evidence of McCombie, Vol. 4, 793/1 to 798/10

3. THE EVIDENCE AT THE SCENE, AND THE AUTOPSY

(a) The Evidence at the Scene

49. Detective McCombie examined the door to Apartment 14, the door outside of which Mrs. Roy had first seen the intruder:

Q. Do I take it you that you are satisfied that Apartment 14 was not broken into or entered in any way?

A. Yes, sir.

.....

Q. I take it you, at no time, received a complaint from the occupant of that apartment, either then or some time later, that anything was actually missing from the apartment?

A. No, we did not.

Evidence of McCombie, Vol. 5, 906/30

50. P.C. Storey, an identification officer with the Ottawa Police Department, arrived at the scene shortly after Detective McCombie.¹¹ McCombie instructed him to take photographs of the scene. While Storey's evidence was confusing in this regard, there was blood, as evidenced in his photographs, on the back stairs running from the landing between the second and main floors down to the basement. The largest deposits of blood were on the stairs as they went from the main floor

¹¹ Other officers, including Detectives Lowry and Coburn, also attended the scene. Neither of these detectives gave evidence at any time during the proceedings.
Evidence of McCombie, Preliminary Hearing, Vol. 4, 336/1

to the basement.¹² It can, therefore, be inferred that Mr. Roy was stabbed on the back stairs landing between the main floor and the second floor, which was where Mrs. Roy had seen him catch the intruder.

Photograph taken by P.C. Storey of the backstairs, from the second floor down to the landing between the first and second floors where Mr. Roy was stabbed (Exhibit 10 at the trial).

¹² The confusion arises because P.C. Storey sometimes described the basement as the “first floor”, and the main floor as the “second floor” in his evidence.

Photograph taken by P.C. Storey of the backstairs, from the first floor up to the landing between the first and second floors where Mr. Roy was stabbed (Exhibit 7 at the trial).

Photograph taken by P.C. Storey of the backstairs, from the first floor down to the landing between the first floor and basement (Exhibit 8 at the trial).

Photograph taken by P.C. Storey of the backstairs, from the basement up to the landing between the basement and the first floor (Exhibit 9 at the trial).

Photograph taken by P.C. Storey of Mr. Roy at the foot of the basement stairs (not filed as an exhibit at the trial).

On February 29, 1972, after Romeo Phillion's arrest, Storey took some further photographs of the interior of the building.

Evidence of P.C. Storey, Vol. 3, 616/30 to 627/40, 629/15-30, 630/10 to 634/5
 Evidence of McCombie, Vol. 4, 797/10-40
 Exhibits 7, 8, 9 and 10, Record, Vol. 10, Tabs 9 to 12
 Investigation Report of Storey, Feb. 29/72, Record, Vol. 2, Tab 111

51. P.C. Storey checked for fingerprints on the outside of the door of Apartment 14, and on the railings and posts of the back staircase from the second floor to the basement. He found no identifiable prints. He did not search for evidence of footprints and did not notice any. Neither he nor Detective McCombie took any samples from the bloodstains as they had no reason to believe Mr. Roy's assailant had been injured and so assumed all the blood had been left by Mr. Roy. No exhibits were seized from the scene. The murder weapon was never found.

Evidence of P.C. Storey, Vol. 3, 627/40 to 630/10, 641/40
 Evidence of McCombie, Vol. 4, 797/20 to 798/5, 800/30

(b) The Autopsy

52. Dr. Major, a coroner, attended the 275 Friel Street building that afternoon and declared Mr. Roy to be dead. Dr. Tolnai, a pathologist, conducted an autopsy on Mr. Roy's body at 5:30 p.m. on August 9. Mr. Roy had a stab wound in his chest, about 1 ½ inches wide and 3 ½ inches deep, below his left nipple. The wound's direction was "slightly upward" and went as far as the tip of Mr. Roy's heart. Dr. Tolnai believed that Mr. Roy likely bled to death from his injury within five minutes.

Evidence of Dr. Major, Vol. 3, 603/10 to 606/20
 Evidence of Dr. Tolnai, Vol. 1, 120/30 to 127/30, 135/40

53. Dr. Tolnai testified that the wound had been caused by a knife which "may or may not have

been both edges sharp”. In cross-examination, he acknowledged that he had, at first, concluded the knife would have had a sharp edge on both sides.¹³

Evidence of Dr. Tolnai, Vol. 1, 125/30 to 126/10, 135/20-35

Samples recovered by Dr. Tolnai

54. Some items were seized during the autopsy:

- Dr. Tolnai seized scrapings, and one or two fragments of hair, from under Mr. Roy’s fingernails. He had no record of these seizures, and had only come to remember that he had made them in April, 1972. By then, his “best recollection” was that the samples were taken away by the police. He recalled that the hair(s) came from Mr. Roy’s right hand. They were short but he could not remember their colour. According to the coroner, Dr. Major, Dr. Tolnai told him at the Inquest in November, 1967 that he still had the hair samples in his possession at that time. Detective McCombie, who testified that he was the only police officer present at the autopsy¹⁴ (and was only there for the first half hour), testified that Dr. Tolnai seized a hair from under a fingernail on Mr. Roy’s left hand.¹⁵ Dr. Tolnai retained the hair:

“At that particular time, Dr. Tolnai would have retained possession of it

¹³ This was of some significance as a result of Mr. Phillipion’s confession that he had stabbed Mr. Roy with a kitchen knife that he stole from one of the apartments.

¹⁴ P.C. Storey testified that he, in fact, was also at the autopsy but was not given custody of any exhibits.
Evidence of P.C. Storey, Vol. 3, 630/5

¹⁵ In his August 9, 1967 investigation report, McCombie described his attendance at the autopsy. He wrote:

“Dr. Tolnai also stated that a hair found underneath the nail on the left hand of the accused (sic) will be retained by him until such time as a suspect is apprehended and should this hair be of value then it will be sent to the Attorney General’s Laboratory in Toronto for further analysis.”

until such time as the Police Department required it for – he would do this for the purpose of continuity, until such time as we required it for samples, physical samples.”

McCombie recalled it being a long dark hair (the deceased had grey hair). At the Inquest, he had described it as being approximately four inches long. The hair, or hairs, had been lost by the time of Mr. Phillion’s trial.¹⁶

Evidence of Dr. Tolnai, Vol. 1, 127/30 to 128/40, 131/20, 134/20

Evidence of Dr. Major, Vol. 3, 607/30

Evidence of McCombie, Vol. 4, 798/10 to 799/15, 884/20; Vol. 5, 913/20 to 924/10

- Detective McCombie remembered that Dr. Tolnai seized some more hairs from the dark blue jersey worn by the deceased.¹⁷ They were also long hairs, and were put into separate vials by Dr. Tolnai. McCombie was asked:

Q. How did those hairs compare to the hair under the fingernail in colour and length?

A. I do not recall, sir.

These hairs had also been lost by the time of Mr. Phillion’s trial.¹⁸

Evidence of McCombie, Vol. 4, 798/40, 884/30

Evidence of Detective Nadori, Vol. 5, 1053/10-40

- Detective McCombie seized Mr. Roy’s watch at the autopsy. It had stopped at 2:47 p.m.

Evidence of McCombie, Vol. 4, 799/15

¹⁶ In preparation for this application, we have obtained a copy of the “*Coroner’s Statement upon Issuing His Warrant for Holding an Inquest*” prepared by Dr. Major on August 13, 1967. Dr. Major stated: “The body was taken to the Ottawa General Hospital where I requested Dr. G. Tolnai M.D. pathologist to perform an autopsy. This was done the same afternoon. A few hairs were taken from the nails of the left hand and from the shirt, and some blood samples to be sent to Toronto.”

Coroner’s Statement upon Issuing His Warrant for Holding an Inquest, Coroner’s Inquest, 2/1-40

¹⁷ At the Coroner’s Inquest, McCombie testified that “four or five hairs” were removed by Dr. Tolnai from the deceased’s jersey.

Evidence of McCombie, Coroner’s Inquest, 31/10

¹⁸ Dr. Tolnai had no recollection of seizing hairs from the deceased’s sweater by the time he testified at the Coroner’s Inquest.

Evidence of Dr. Tolnai, Coroner’s Inquest, 4/30

55. McCombie obtained hair samples from Phillion with his consent after his apprehension in New Liskeard on August 13, 1967 (*infra*). No comparison was attempted with the unknown hairs seized from the deceased's hand and sweater, apparently because McCombie was under the (mistaken) belief that hair examination "was a one-shot examination". McCombie, therefore, did not want to "waste" the hairs after Mrs. Roy had failed to identify Romeo Phillion in the line-up¹⁹ (*infra*).

Evidence of McCombie, Vol. 5, 925/1 to 926/5

4. THE IDENTIFICATION EVIDENCE

Introduction

56. The quality of the identification evidence called by the Crown in an effort to support its case that Mr. Phillion was the intruder who stabbed Mr. Roy was poor. The substance of the evidence was provided by Mrs. Roy who was asked to view photographs, photosreads and in-person line-ups. Detective McCombie, the investigating officer, had been present on most of these occasions but in the intervening five years had lost his notes and so testified that he was reliant on his memory.²⁰

¹⁹ Romeo Phillion was the only person during his investigation from whom McCombie obtained hair samples.
Evidence of McCombie, Preliminary Hearing, Vol. 4, 369/40

²⁰ There was no need for him to have relied on his memory. There was an abundance of police investigation reports that he could have reviewed, the largest number of which he had written himself.

Mrs. Roy's original description of the assailant was not led in evidence.²¹ The only other witness who caught a glimpse of the intruder was Mrs. Robitaille who lived in Apartment 7 on the main floor. When she heard the commotion outside her apartment, she came out and saw the intruder inside the building trying to open the front door of the building to escape. She only saw him from behind. She was asked:

Q. ... Mrs. Robitaille. The man you saw at the door.

A. Yes.

Q. Can you say what age he was, approximately?

A. I couldn't say approximately. He was not too tall, he was kind of slim and very curly hair at the back. I couldn't see his face.

Q. What was he wearing?

A. As far as I can remember, it seemed to me he had either a short leather coat, some kind of coat like that.

Q. And what colour?

A. It seemed to be black.

Q. And was he wearing trousers?

A. Yes.

Q. What colour were they?

A. I can't – they were dark, anyway.

Q. And what colour was his hair?

A. Dark; black.

²¹ The trial judge pointed out this omission in her charge to the jury. The earliest description provided by Mrs. Roy is found in McCombie's report of August 9, 1967 for 2:53 p.m. He recorded her description of the intruder as "34-35, short, 5'2", wearing a dark brown suit, with black wavy hair."

See Charge to Jury, Vol. 6, 1288/20

Investigation Report of McCombie, Aug. 9/67, Record, Vol. 2, Tab 1

Q. And you said it was curly, I think?

A. Yes. It was kind of long and curly at the back.

Q. Was he wearing anything on his head?

A. No.

Q. Was he holding anything in his hands?

A. I didn't see anything.

Evidence of E. Robitaille, Vol. 4, 781/30 to 782/20

(a) Mrs. Roy's Opportunity to Observe the Intruder

57. Mrs. Roy testified that she saw the intruder's face three times:

- she saw his face the first time when he turned around to face her outside Apartment 14 after she had twice asked if she could help him. At that time, she estimated she was six feet from him. She estimated that she looked at his face "for a few seconds, because he turned back again",²²
- she saw the man as he turned again and ran by her along the second floor hallway to the back stairs. He came within two feet of her. She testified that at this point she saw his face for "a few seconds",²³
- she saw the man's face for a third time when he jumped the railing between the second and

²² At the preliminary hearing, she estimated that at this point in time she saw the man for "about a second".

Evidence of Mrs. Roy, Preliminary Hearing, Vol. 2, 115/10.

²³ At the preliminary hearing, she estimated that at this point in time she saw the man for a second.

Evidence of Mrs. Roy, Preliminary Hearing, Vol. 2, 115/10.

main floors on his way down the back stairs, and her husband caught him on the landing and pushed him into the corner.²⁴ She was asked:

Q. How long did you observe his face when your husband was holding him?

A. My husband was holding him quite a few seconds; that's when I had a good look at him mostly, because it's quite bright there.

Q. How far would you have been from - - -

A. While I was near Apartment 17.

Q. Can you estimate the number of feet, Mrs. Roy?

A. Not really. I think it must be about seven feet going down the stairs.²⁵

Mrs. Roy only used reading glasses, and so was not wearing glasses at the time.

Evidence of Mrs. Roy, Vol. 3, 671/40; Vol. 4, 703/40 to 705/5, 750/10 to 753/5

(b) Mrs. Roy's Description of the Intruder

58. In her trial testimony, Mrs. Roy described the man as follows:

- 29 to 30 years of age
- 5'3" to 5'4"
- 135 to 140 lbs. - "not too big"
- short, dark, curly hair
- a small face, a high forehead, small lips and a small chin
- no facial hair

²⁴ She gave a different version of these events at the Coroner's Inquest (*supra* footnote 10).

²⁵ At the preliminary hearing, she testified that she saw the man at this point for two or three seconds.

Evidence of Mrs. Roy, Preliminary Hearing, Vol. 2, 115/20

- no glasses
- wearing a dark blue navy suit.²⁶

On August 15, Mrs. Roy viewed a line-up in which Romeo Phillion was a participant (*infra*). At that time, the police recorded a description of Mr. Phillion as follows:

- 28 years of age
- 5' 6"
- 133 lbs.
- brown hair.

Evidence of Mrs. Roy, Vol. 4, 705/1 to 706/5

Evidence of McCombie, Vol. 5, 906/40 to 907/25

See Exhibit 19: Evidence of Det . McCombie, Vol. 4, 892/30; Record, Vol. 10, Tab 23

59. Mrs. Roy asked the man in English if she could help him as he stood outside Apartment 14. The man “blurred something” in reply. She was “positively sure” that both her husband and the intruder spoke to each other in French when she overheard them talking to each other during their struggle on the back stairs landing. She was cross-examined at Mr. Phillion’s trial on her evidence at the Coroner’s Inquest in this regard:

Q. Do you remember being asked at the coroner’s inquest, at page 13, line 32:

Q. Did you hear this person say anything?

A. Well, I can’t recognize it, it was French and English. He said he wasn’t doing anything wrong. I’m not sure if it was French or English.

²⁶ In her original description of the intruder to Detective McCombie on August 9, 1967, Mrs. Roy described him as follows:

“34 to 35, short, 5'2", wearing a dark brown suit, with black wavy hair”.

Investigative Report of McCombie, Aug, 9/67 at 2:53 p.m., Vol. 2, Tab 1 (See Footnote 21, *supra*).

Q. Do you remember being asked this question and giving this answer?

A. Yes, I do, but I improved since because I was not well, and I know it is French.

Q. Now you are saying it was French, and you are positively sure it was French?

A. Sure.

Q. Even though at one time you were not sure whether it was English or French?

A. Well, that was when my husband died.

Q. And you were more sure that he spoke French than that the man in the courtroom was at the scene of the crime?

A. He spoke French.

Evidence of Mrs. Roy, Vol. 3, 671/40; Vol. 4, 748/30, 760/30 to 762/20

See Evidence of Mrs. Roy, Coroner's Inquest, 13/30, 14/30-40

See Evidence of McCombie, Coroner's Inquest, 35/1

60. The jury knew that Mr. Phillion spoke English as a result of his statements to the police (*infra*), and that he spoke at least some French as a result of his conversation in the cells with P.C. Couture (*infra*). The jury did not know what Mr. Phillion's first language was, but may have presumed from his name that it was French.

Evidence of P.C. Couture, Vol. 5, 1025/40

(c) Mrs. Roy's Own Assessment of Her Ability to Recall

61. Mrs. Roy's own assessment of her ability to recall the events of her husband's murder was

of importance. She testified that it took her “quite a while” after her husband’s murder before she began to remember things very clearly, that it took her “over two years”, and that in the context of her identification of Mr. Phillion as the intruder

“...I really saw him; my mind is not like it used to be, you know. I improve a lot.”

Evidence of Mrs. Roy, Vol. 4, 757/1-20, 760/30

(d) Mrs. Roy’s Several Attempts at Identifying
the Intruder on August 9 and 10

62. The jury likely found the evidence of the several occasions on which Mrs. Roy was asked to view photographs and/or line-ups to be confusing. An attempt is made herein to match Mrs. Roy’s memory of each occasion with Detective McCombie’s memory. In addition, on three occasions Mrs. Roy alerted the police to having seen someone in public whom she believed was the intruder she had seen on August 9.

(i) *Photographs shown to Mrs. Roy at her home on August 9*

63. In the late afternoon of August 9, police went to Mrs. Roy’s apartment and showed her, in Mrs. Roy’s words:

“...an awful lot of books from the station, to look at pictures”

Mrs. Roy could not remember whether she identified anyone from the photographs. Detective

McCombie testified that she did not.²⁷ No evidence was led as to whether Mr. Phillion's picture (or that of his brother) was among the photographs.

Evidence of Mrs. Roy, Vol. 4, 706/10-30
Evidence of McCombie, Vol. 4, 884/40 to 885/15

(ii) Photographs shown to Mrs. Roy at the police station on August 9

64. Mrs. Roy testified that she was taken to the police station around 5:30 – 6:00 the evening of the murder to look at more photographs with Detective McCombie. She could not remember if she identified anyone, and no evidence was led as to whether Mr. Phillion's photograph (or that of his brother) was among the photographs.²⁸

Evidence of Mrs. Roy, Vol. 4, 706/25-30

(iii) The first in-person line-up viewed by Mrs. Roy at the police station on August 10

65. During the afternoon of August 10, Mrs. Roy viewed an in-person line-up through a one-way glass in a room at the police station. Detective McCombie believed that "five or six" men were in the line-up. Mr. Phillion was not in the line-up. According to McCombie, Mrs. Roy "said there was

²⁷ At the Coroner's Inquest, McCombie testified that Mrs. Roy pointed to one or two photographs as a likeness to the intruder.
Evidence of McCombie, Coroner's Inquest, 31/40

²⁸ Detective McCombie made no reference in his trial testimony to this showing of photographs to Mrs. Roy.

no one in the line-up”²⁹.

Evidence of McCombie, Vol. 4, 885/10 to 886/20

66. Mrs. Roy’s evidence was not clear regarding the first line-up that she viewed. She thought that she first saw a line-up a few days after her husband’s murder. She recalled that she viewed line-ups “quite a few times” and testified that “Every time I went in, I just point one”.

Evidence of Mrs. Roy, Vol. 707/20 to 708/30

(iv) Photographs shown to Mrs. Roy at the funeral parlour on August 10

67. On the evening of August 10, Detective McCombie showed ten photographs of men to Mrs. Roy at the funeral parlour. Among the pictures was one of Mr. Phillion, and one of his identical twin

²⁹ This line-up, which Mrs. Roy in fact viewed at 11:00 a.m. on August 10, was held to see whether she might identify one Patrick Sauve as the intruder. The jury was not told this. There were six men in the lineup. Mrs. Roy made no identification. She thought all the participants were too tall and “was very insistent that the man was from 5 ft. 1 ins. to 5 ft. 3 ins.” Mr. Sauve had been arrested by the OPP on August 9 hitchhiking outside Ottawa, and his appearance matched the description of the intruder provided by Mrs. Roy. He also had a lengthy criminal record.

Investigation Report of McCombie, Aug. 10/67, Record, Vol. 2, Tab 13

brother, Donald.³⁰ McCombie testified:

A. The group of photographs were handed to her and she was asked to look through the photographs and tell me if she saw the person responsible. She looked – pulled out the photograph in position number two and said nothing, continued on and pulled out the photograph in nine position, looked at ten, and then said, “These two look very much like brothers.”

Q. Which two?

A. The two photographs she had taken out in number two and number nine positions.

Q. And was Mr. Phillion’s photograph in those?

A. Yes. He was in number two position.

Q. And of those ten photographs did she pick anyone out?

A. Yes. She picked, as I said, the two photographs and said they looked very much like brothers and then she picked the photograph in number nine position as the person she thought most as resembling the person.

Q. And did number two and number nine photographs look similar?

A. Yes they did, sir.

³⁰ McCombie’s August 10, 1967 investigation report, from the archives, discloses that Romeo and his brother Donald became suspects as a result of one Lt. Lowry but does not explain why. McCombie’s report began as follows:

“While at the RCMP Headquarters I received a telephone call from Lte. Lowry regarding one Donald Phillion and his twin brother Romeo Phillion who are both known to this dept. and a copy of their records along with a photo of both persons were obtained from the RCMP.”

The report went on to describe how photographs of the Phillion brothers were obtained, placed among a group of photos and shown to Mrs. Roy that evening.
Investigation report of McCombie, Aug. 10/67, Record, Vol. 2, Tab 16

At the Coroner's Inquest, McCombie testified that she looked at the photographs "with some reservation that she thought possibly that was the man"³¹ The set of photographs has since been lost by McCombie, along with his notes (*infra* paragraph 212).

Evidence of McCombie, Vol. 4, 886/20 to 887/40; Vol. 5, 929/10-40
Evidence of McCombie, Coroner's Inquest, 32/10

68. Mrs. Roy described her memory of this showing of photographs:

A. He had several pictures with him and he showed me the pictures, and I asked if he would show them back at me because there was something that looked fishy, and he said, "I am glad you told me, Mrs. Roy - - -"

Q. Just a minute. When you looked at those pictures, Mrs. Roy, did you pick anyone out?

A. There was two of them that looked alike.

Q. And out of those two pictures, did you pick one of them?

A. No, I didn't.

It seems from her testimony that she remembered simply noticing that two of the photographs seemed to be of the same person, not that she chose these two photographs because the men depicted

³¹ In his August 10 investigation report, McCombie wrote:

"After viewing the photos, [Mrs. Roy] picked out the picture of Romeo Phillion which was in #2 position and kept looking at this photo while she was still turning the remaining photos and the photo of Donald was in #10 position and when she came to this, she took both photos and stated that these two looked very much like brothers, and then stated the one of Donald was the one most resembling the person who had committed the murder. She states that she could not be absolutely sure of this and stated she did not wish to get anyone into any trouble, but felt that if she saw this person in a line-up, she would be able to identify him in a more precise manner."

McCombie thereupon issued a general broadcast for Donald Phillion's apprehension.
Investigation report of McCombie, Aug. 10/67, Record, Vol. 2, Tab 16

resembled the intruder.³²

Evidence of Mrs. Roy, Vol. 4, 706/40 to 707/20

(e) Mr. Phillion's Apprehension in New Liskeard and the In-person Line-up in Ottawa

69. On August 12, 1967, Detective McCombie and Detective Coburn, McCombie's partner in the investigation of the homicide, drove to New Liskeard.³³ They requested the local police department arrest Mr. Phillion in New Liskeard. This was done early the following morning. The jury was not informed why Mr. Phillion had become a suspect in the murder but likely presumed that it was as a result of Mrs. Roy's reaction to the photographs shown to her at the funeral parlour. At the time of his arrest, Phillion's car was searched but nothing of significance was found. McCombie drove Phillion back to Ottawa. On the morning of August 15, an identification parade of ten men, including Phillion, was viewed by Mrs. Roy at the Ottawa police station. Detective Coburn was also present. Phillion was placed in the number 8 position and a photograph (exhibit 18) was taken of the parade.³⁴

Evidence of McCombie, Vol. 4, 887/30 to 889/40, 890/40 to 891/20, Preliminary Hearing, Vol. 4, 367/40
 Evidence of P.C. Bolger, Vol. 5, 952/10-30
 Exhibit 18, Record, Vol. 10, Tab 18

³² At the preliminary hearing, Mrs. Roy testified that Detective McCombie only showed her four photographs at the funeral parlour.

Evidence of Mrs. Roy, Vol. 2, 86/40, 87/45, 109/50

³³ McCombie had learned that Phillion was in New Liskeard as a result of Gail Brazeau giving him a letter on August 12, 1967 that Phillion had written to her from New Liskeard.

See Synopsis of Crown's Case, Record, Vol. 13, Tab 4.

³⁴ McCombie testified that P.C. Storey took the photograph of the lineup (Exhibit 18). P.C. Storey denied this. It remains unknown who actually took the photograph.

Evidence of McCombie, Vol. 4, 890/40
 Evidence of Storey, Vol. 5, 948/1 to 949/30
 Exhibit 18, Record, Vol. 10, Tab 18

70. McCombie testified that, when Mrs. Roy entered the room and looked through the glass, she became very nervous, immediately indicated Mr. Phillion and said, “That’s the fellow there.”

McCombie testified:

A. She was in a very nervous state at that time. She seemed quite sure of her identification. I waited a few moments and took her into a sort of anteroom that is on the right, and asked her if she felt well enough to go into the room and we would walk along in front of the line-up and she could point to the person whom she identified and we would leave the room. She consented to do this and we entered the room, walked to the left of the line-up – or to the left facing it, which would be the number one position. She walked down the line-up and passed number eight and out of the room. We got outside the room and she said, “No”, she said, “I don’t think so. I don’t want to get anybody into trouble. I can’t be sure.”³⁵

³⁵ McCombie has made several contradictory statements as to what Mrs. Roy said at the time. In his will say, he stated that, after she had first picked Phillion out, they entered the actual line-up room, “at which time she again viewed the person in #7 position, at this time became very scared and said again at that time, ‘This looks very much like the man who stabbed my husband’.” At the Coroner’s Inquest, McCombie recalled Mrs. Roy saying when they went back into the room, “I have a feeling it might not be [the man].” In his contemporaneous investigation report, McCombie wrote:

“Mrs. Roy was requested to come into the line up room proper and view the persons from a close up position and if she felt when she got to Roy (sic), that she was asked if she would point to him stating that is the man. She agreed to do this and upon entering the lineup room, she viewed the lineup from left to right and when she finished she stated that she could not be sure if this was the man or not. She states that she did not want to get anyone in trouble and she also expressed fear for herself. When questioned in regards to the appearance of Phillion, she stated that this man looked very much like the man who had stabbed her husband but she was not in a position to swear that he was the person.

As the result of this identification it is felt that at this time there is insufficient evidence to charge this person with the murder of Leopold Roy ...”

In the last paragraph of his report, McCombie expressed no discomfort with Mrs. Roy’s repudiation of her initial response on seeing Phillion in the lineup. He wrote:

“It is felt by the writer at this time that there is very little chance of the deceased’s wife, Mildred Roy identifying the person responsible, if she were to view more line ups but every effort will be made to apprehend the person responsible for this crime and the investigation will continue.”

Q. Did she stop in front of anyone when she was actually in the line-up room?

A. No she did not, sir.³⁶

This was the only in-person line-up in which Mr. Phillion participated. His brother, Donald, was never put in a line-up.

Evidence of McCombie, Vol. 4, 889/30 to 890/40, 928/1; Vol. 5, 92520 to 929/10

71. Mrs. Roy was asked to recall the events of the August 15 identification parade. She testified that, after she picked out Mr. Phillion from behind the glass, McCombie told her to walk with him in front of the glass down the parade of men. She continued:

Q. when you went into the room where the men were lined up, can you tell us what you did?

A. I stood in front of the man that was, you know, about the same height. I stand right in front of him.

Q. Did you look at him?

A. Yes, I did.

Q. What did you do then?

A. I waited until we got out of there to tell Mr. McCombie about it.

Q. And would you tell us, please what happened?

³⁶ At the Inquest on November 2, 1967, McCombie was asked:

Q. Getting back to this man (Romeo Phillion) indicated by the "X" (on the photograph), I take it you did not have sufficient evidence to warrant the laying of a charge.

A. Pardon?

Q. You did not have sufficient evidence against this person to . .

A. That's right.

Evidence of McCombie, Inquest, 33/45 to 34/5

A. I seen Donald Phillion in the line-up, too.³⁷ I told Mr. McCombie, “I’m sorry, Mr. McCombie; he really looks like him but I can’t say yes; I’m sorry.” I was in a depressed state.

During her cross-examination, Mrs. Roy was asked:

Q. ... Mrs. Roy, I suggest to you that at no time in any line-up did you ever say that was the man, “I am positive”, isn’t that true?

A. Yes, that’s true; lately.

Q. What do you mean by that?

A. I meant to say in court I told you that.

Q. Were you under oath, hand on the Bible, when you said that?

A. Yes, I was.

Q. And was it true?

A. Yes, it was true.

Q. And was it as true then as it is now?

A. It is.³⁸

She further testified in cross-examination that it “may have been I stopped at two [line-ups].” When told by defence counsel that Mr. Phillion was only in one line-up, she responded “I saw his brother.”

When told that Donald Phillion had not been in any line-up, she responded:

“Well, I was just saying the size and the height”.

³⁷ Donald Phillion was not in the line-up.

³⁸ At the Coroner’s Inquest, Mrs. Roy had the following exchange with the Crown:

Q. You did on one occasion identify someone in one of these lineups.

A. That he resembled the person.

Q. That he resembled the person you had seen.

A. Yes, but when I got near him, it didn’t look like him.

When defence counsel suggested to Mrs. Roy that she may have made a mistake, she replied, “I am pretty sure of myself.”

Evidence of Mrs. Roy, Vol. 4, 707/30 to 709/40, 753/10 to 755/30, 760/30-40

72. As has been seen, Mrs. Roy could not remember how many line-ups she viewed. She recalled viewing a line-up “for Mr. Rotor, who got stabbed in 1968.”³⁹ Detective McCombie had no knowledge of this viewing.⁴⁰

Evidence of Mrs. Roy, Vol. 4, 710/15-30; 715/35-40

³⁹ We do not have any information about the stabbing of Mr. Rotor.

⁴⁰ At the preliminary hearing, Detective McCombie remembered showing Mrs. Roy more photographs on more than two occasions, and also knew that she had viewed at least one more identification parade on September 20, 1967 with other officers. In addition to the line-ups and photographs viewed by Mrs. Roy to which reference was made in the evidence at trial, police investigation reports establish that, at a minimum, Mrs. Roy viewed further line-ups and photographs upon the following occasions:

- on August 21, 1967, she viewed a series of photographs, number unknown; the suspect was one Raymond Dupont. According to Detective Lecompte, Mr. Dupont was familiar to Mrs. Roy but not as the intruder who murdered her husband,
- on September 20, 1967, she viewed an in-person lineup of an unknown number of men; the suspect in the lineup was one David Max Laronde. Mrs. Roy made no identification. She told Detective Wise that the culprit “had curly hair and a bit of whiskers”,
- on September 22, 1967, she viewed a photographic line-up of seven men; the suspect, of whom there were two photographs in the lineup, was one Gerald Lavergne. Mrs. Roy failed to pick anyone from the lineup,
- on November 27, 1967, McCombie wrote in a report that he planned to show Mrs. Roy photographs of eleven suspects. There is no report to confirm that this happened.
- she was also shown photographs of individual suspects on August 10, 1967 (Robert Desjarlais), and April 12, 1968 (Robert Miner).

Investigation Report of Lecompte, Aug. 21/67, Record, Vol. 2, Tab 33
 Investigation Report of Det. Wise, Sept. 20/67, Record, Vol. 2, Tab 43
 Investigation Report of Det. Wise, Sept. 22/67, Record, Vol. 2, Tab 45
 Investigation Report of McCombie, Nov. 27/67, Record, Vol. 2, Tab 53
 Investigation Report of McCombie, Nov. 27/67, Record, Vol. 2, Tab 55
 Investigation Report of McCombie, Apr. 12/68, Record, Vol. 2, Tab 76
 See evidence of Detective McCombie, Preliminary Hearing, Vol. 4, 348/10 to 349/40

(f) Subsequent Identifications by Mrs. Roy

73. Any concern that Mrs. Roy did believe that Mr. Phillion was the intruder was modified by her conduct thereafter because she continued to actively look for her husband's assailant. During her examination-in-chief, she was asked:

Q. Some time after this occasion when you saw the line-up that you have been describing to us, did Detective McCombie give you any instructions to look out for people?

A. He told me if I ever see anybody that resembles him, to let him know. That is exactly what I did.

Q. And did you see – over the next period of time, did you see any people that you thought resembled the person that you saw in the hallway?

A. Yes.

Q. How many times did that happen?

A. Three times.

McCombie had no knowledge of these occasions, but did recall receiving several calls from Mrs. Roy, and one in particular, when she said she was in a hotel. At the time, he was otherwise engaged “and the subsequent investigation was with negative results.” The three occasions referred to by Mrs. Roy were flushed out in her cross-examination.

Evidence of Mrs. Roy, Vol. 4, 709/40, 710/40 to 711/20, 753/40
 Evidence of McCombie, Vol. 4, 893/10-30; Vol. 5, 929/30 to 930/20, 924/30

74. One afternoon in the summer of 1968, Mrs. Roy was in a hotel and saw a man there who resembled the intruder, and called the police. The police came and took the man away and, in Mrs. Roy's words, “they made a bad mistake there.” He was, she testified, not the right man.

Evidence of Mrs. Roy, Vol. 4, 757/10-40

75. A few months later, the same thing occurred when Mrs. Roy was in another hotel. She was “fairly sure” the man, whom she had seen before at another location, was the intruder “because he looks like him”. Again, the police apprehended the man, and she heard no more about it.

Evidence of Mrs. Roy, Vol. 4, 757/40 to 758/10, 759/40 to 760/30

76. In the autumn of 1970, Mrs. Roy was sitting in another hotel and saw a man, whom she believed resembled the intruder, sitting with a girl. She called the police. She then left and did not know whether the police came. There was no evidence of the extent to which these three men looked like, or differed in appearance from, Mr. Phillion. There was no evidence as to whether their appearance conformed to, or differed from, Mrs. Roy’s original description of the intruder.

Evidence of Mrs. Roy, Vol. 4, 758/10 to 759/10

77. No other evidence was called regarding these three identifications by Mrs. Roy.⁴¹ There was no evidence to suggest that Mr. Phillion could have been any of the men whom she saw on these occasions. In fact, on the first two occasions, Mr. Phillion could not have been either of the men because he was in jail at the time serving a three year sentence.

Criminal Record of Romeo Phillion, Record, Vol. 4, Tab 41

(g) Mrs. Roy’s Identification of Mr. Phillion in the Courtroom

78. Mrs. Roy testified in her examination-in-chief that the man whom she picked out of the lineup on August 15, 1967 was the August 9th intruder. She was asked:

⁴¹ None of these three hotel sightings are referred to in any of the police investigation reports that have been located.

Q. And the person that you picked out, do you see that person in Court today?

A. Yes, he is (and she then pointed to Mr Phillion).

In cross-examination, she testified that she was “pretty sure” that Mr. Phillion was the intruder.⁴²

Evidence of Mrs. Roy, Vol. 5, 710/40, 761/5

5. EVIDENCE OF MR. PHILLION’S WHEREABOUTS ON AUGUST 9, 1967 AND THE DAYS THEREAFTER

(a) The Evidence of Marie Brazeau and Denise Barbe

79. Marie Brazeau was living at 248 York Street in Ottawa in August 1967, a short distance from 275 Friel Street. She testified that Mr. Phillion had “run off” with her daughter, Gail, in 1965, and they were still together in 1967. In 1967, they visited Mrs. Brazeau twice, once in May or June, and once towards the beginning of the month in August. They came in Mr. Phillion’s car, a Ford convertible with a red body and a black top.⁴³ Mr. Phillion “stayed overnight” at her house, and Gail

⁴² It may be that Mrs. Roy knew of Mr. Phillion’s confession before she testified, either because she had been told, or because it would have been publicized after the Crown’s opening address to the jury. She had certainly seen his photograph in the newspaper after his arrest on January 11, 1972.

Investigation report of Huneault, Jan. 13/72, Record, Vol. 2, Tab 98

⁴³ According to P.C. Bolger, he reviewed a bill of sale dated August 1, 1967, that Phillion produced to the New Liskeard police which stated that he had paid \$200.00 to one Robert Porter of 777 Lawrence Avenue West in Toronto for the vehicle. In an August 10, 1967 investigation report, McCombie noted that the Motor Vehicles Department had recorded the purchase as having been made on July 25, 1967 for \$200.00 cash, the car being registered in the name of Romeo Phillion of 18 Lauter Street, Toronto. Ottawa police asked the Toronto Police Department to investigate the 18 Lauter Street address. However, there is no further reference in any investigation report suggesting that information was forthcoming from Toronto in response to this request.

Investigation Report of McCombie, Aug. 10/67, Record, Vol. 2, Tab 16
Evidence of Bolger, Vol. 5, 951/30-45

remained with her thereafter.

Evidence of Marie Brazeau, Vol. 4, 782/40 to 791/30

80. Denise Barbe lived next door to Mrs. Brazeau at 246 York Street. She remembered that she saw Mr. Phillion on the first Friday in August, 1967 (August 4) and thereafter for several days. She saw Gail Brazeau with him, and his convertible. In particular, she remembered that on Wednesday, August 9, the day of the homicide, after her weekly bingo game at an establishment called *Le Coin Du Livre*, she saw Mr. Phillion some time after 10:00 p.m. as she walked home. He was at the side of the house, his car was across the street, and Mrs. Barbe's husband was sitting outside on their verandah. She and her husband went inside, and then came back out again, at which time Mr. Phillion told her husband that he was planning to go home to New Liskeard and wanted to sell his car.⁴⁴

Evidence of Denise Barbe, Vol. 5, 932/40 to 943/10

81. Mr. Cogan did not challenge Mrs. Barbe's memory of seeing Mr. Phillion on the night of August 9 outside 246 York Street after her return from playing bingo. In fact, he acknowledged that his client was in Ottawa *after* Mr. Roy's murder. In brief submissions during her evidence, but in the absence of the jury, he said to the Court:

“... my friend indicated he would not go into conversations [between Mr. Phillion and the Barbes], just simply to establish that the accused was in Ottawa on the day in question.

.....

⁴⁴ Mrs. Brazeau testified she remembered an occasion during early August when, one night at about 10:00 p.m., she saw from her window Mr. Phillion talking to Mr. Barbe at the back of the Barbes' house.

Evidence of Marie Brazeau, Vol. 4, 790/35 to 791/20

I would like [the Crown] to indicate that and my understanding was that this evidence [of conversation between Mr. Phillion and the Barbes] was only to show he was in Ottawa on the 9th August *and I mentioned that there was no issue about that.*"⁴⁵ (emphasis added)

Mr. Cogan did not repeat this in the presence of the jury but at no time did he challenge Mrs. Barbe's claim that she saw Phillion on the night of August 9. Both counsel gave their closing addresses as if it was an assumed fact.

Defence Submissions, Vol. 5, 937/10-45

82. Early in the morning on August 11, 1967, P.C. Bolger of the New Liskeard Police Department saw Mr. Phillion sleeping in his convertible on Wellington Street in New Liskeard. It was the first time Bolger had seen him for several months. He woke him up and asked him what he was doing in the car. Mr. Phillion told him that he was waiting for the morning because he did not know where his brother, Donald, lived in New Liskeard.

Evidence of Bolger, Vol. 5, 949/40 to 952/30

(b) The Evidence of Neil Miller

83. Neil Miller was 19 years of age at the time of Mr. Phillion's trial. He was born in Pembroke, Ontario. In 1970, he went to Ottawa and lived at numerous addresses for brief periods of time. At

⁴⁵ The Crown's handwritten draft cross-examination of Phillion has been found in the archives. On it, the Crown wrote, *inter alia*,

"admission that he was in Ottawa Aug. 9".

Crown's Handwritten Notes, Record, Vol. 12, Tab 2

first, he went to school and was supported by Social and Family Services payments. After he left school, he was on welfare. In the meantime, he “got involved with the wrong people”, including Mr. Phillion. Mr. Miller met Mr. Phillion in October, 1970. They resided together at various addresses. Their relationship was both intimate and stormy. In the words of Mr. Miller:

“... I hated [Mr. Phillion] one moment; loved him the next; hated him the next; loved him the next; et cetera.”

During his testimony before the jury, Miller was asked:

Q. And do you still have concern for Mr. Phillion? Do you still feel something for him?

A. Yes.

Mr. Miller used narcotics including Valium and Librium on prescription, and metamphetamines and LSD. He also drank heavily during the nine months he lived with Mr. Phillion. He had been hospitalized for a drug overdose in July, 1970 and sought treatment at the Kingston Psychiatric Hospital to “cure” his homosexuality.

Evidence of Neil Miller, Vol. 5, 958/40 to 965/10, 971/10

84. In January, 1972, Mr. Miller was living in Ottawa with others in a high rise apartment building at 1440 Mayview Avenue, Apartment 1001. This apartment was located in the Alexander Park neighbourhood of Ottawa, about 10 kilometers from Friel Street. This was a period when he was drinking heavily. On January 7, Miller had not been drinking but he was unsure whether he had taken LSD that day, or was perhaps “flash backing” from a previous LSD experience. Mr. Phillion was at his apartment that evening. He and Mr. Miller were making love on the living room floor. Mr. Phillion was very depressed, was talking about suicide, and claimed to not care if the police shot him. Mr. Miller’s testimony included the following:

Q. And did Mr. Phillion say anything to you on that day or during the evening?

A. Yes. He could have.

Q. Would you tell us what he said?

A. It could have been on that day or another day, but to the best of my knowledge he told me once more⁴⁶ about the murder and how it took place and where it took place and all he told me.

Q. Would you tell us then, as closely as you can remember, just what happened and what he told you about it?

A. It took place on Friel Street someplace.

Q. Keep your voice up, Mr. Miller.

A. It took place on Friel Street and it was in an apartment building and there was supposed to be an amount of money hid under a bed or something in one of the rooms and I don't know if he got into the room or not, and when he left the room there was a fireman or whatever coming up the stairs and he was rushing down the same flight and out of fear he was supposed to have used the knife on that person, and then he said that he went from Ottawa to North Bay in a red convertible and when he got to North Bay he was brought back to Ottawa – I don't know, by the police, or how he came back and he might have stood trial, I don't know that.

Q. And when did this happen?

A. That was January 7th of 1972.

Q. But what he was telling you - - -

A. Around that date.

Q. What he was telling you about, what you have just told us, when did that happen? He was describing an event to you, when did that event happen?

A. '67.

Mr. Miller told Mr. Phillion that he did not believe him, which he did not, and Phillion replied, "Yes, it is true".

Evidence of Neil Miller, Vol. 5, 955/40 to 957/45, 961/25 to 964/10, 971/1, 981/40 to 983/5

⁴⁶ In his evidence for the jury, Miller was not asked to expand on any previous conversation with Phillion about the murder. He had, however, given evidence in this regard on the *voir dire*, see paragraph 192 *infra*.

85. Mr. Miller described Mr. Phillion as someone who liked to feel “he was a big man”. He would admit to things he never did, and Mr. Miller never knew whether to believe his claims. Miller was asked:

Q. Mr. Phillion, I take it, during the time you lived with him was a person who lived in kind of a world of fantasy. Would you agree with that; that he made up a lot of things?

A. Yes.

Q. And he was a person who said he did a lot of things that he didn't do?

A. Some things.

Q. And there was very little that you could believe about him. Is that true?

A. Yes.

Evidence of Neil Miller, Vol. 5, 965/25-35, 970/30-40

6. MR. PHILLION'S CONFESSION TO DETECTIVES HUNEAULT AND NADORI ON JANUARY 11, 1972

86. On the morning of January 11, 1972, Detectives Roland Huneault and Stephen Nadori, both members of the Ottawa Police Department, arrested Mr. Phillion in Ottawa at his mother's home at 46 Nelson Street, Apartment 3. They took him to the police station. The jury did not hear of his arrest for the robbery, nor of his statement to the police about the robbery that he gave before 12:00 noon. At noon, Huneault and Nadori were escorting Mr. Phillion to the cells. Nadori asked him:

““Is there anything else that you wish to tell us about,” and [Phillion] said, “there is nothing to tell”, and I asked him, “What did you do in Toronto?” and then he said nothing.”

Nadori explained that he was “fishing” when he asked Mr. Phillion these questions. He wanted to see whether he “had committed perhaps something else”.

Evidence of Detective Nadori, Vol. 5, 1029/5 to 1030/30, 1038/1
 Evidence of Detective Huneault, Vol. 5, 992/30 to 994/40

87. Detective Huneault then took Mr. Phillion to the cell area alone. He testified:

As we were walking to the cell area, just prior to entering a cell, I asked the accused if he had anything else to tell us. He said, in reply, “What did Neil Miller tell you?” I replied, “He told a lot about the things you bragged about to him.” He replied, “Did Neil tell you about anything big?” I said, “Yes”. He said, “From where?” I replied, “All over, everything”. At this point he said, “I’ll confess.” I asked him what he meant and he said, “Something big, like murder the fireman, I did it.” *[At this point, Detective Huneault gave Mr. Phillion a standard police caution]*

Immediately after that [Mr. Phillion] said, “Just get me a coffee, I am thirsty. We’ll talk about it”. I went to the cafeteria on the fourth floor, got coffee, returned to the cells, was allowed entry into his cell, sat down beside him and without any further conversation he said, “I did the murder of the fireman a long time ago on Friel Street”. He said, “I will give you a full confession if and after I have spoken to Neil Miller”. I replied – I told him this conversation would have to be in my presence and that Neil would be brought to the station at his request. I left the cell proper and in doing so, he was still seated on the bed, he said “Oh, there was a reward. I want Neil to get it”. I replied, “I don’t know anything about the case or any reward. Should there be one the proper authorities will be aware of it, I am sure.” I left the cell block area at 12:16 p.m..

To Huneault, Phillion appeared to be relaxed as he spoke.

Evidence of Detective Huneault, Vol. 5, 994/30 to 996/45

88. Detective Huneault told Detective Nadori and his supervisor, Detective Sgt. Norton, what had occurred. Huneault and Nadori went to 1440 Mayview Avenue where Neil Miller was living. They asked him to come to the police station and he agreed to do so. Once at the station, Miller gave a statement to the police in which he told them that Phillion claimed he had murdered Mr. Roy. Miller, who had talked to Detective Huneault “before”, had not previously told Huneault about the murder. Miller testified that, at the time he gave the statement to the police, he hated Phillion.

According to Huneault, Miller also told them that Phillion “lived in a world of fantasy and told a lot of lies”; that Phillion “liked to feel that he was a big man; half the things he said Miller didn’t believe.”

Evidence of Detective Huneault, Vol. 5, 995/40 to 996/20, 1005/10-45
 Evidence of Detective Nadori, Vol. 5, 1031/10-30
 Evidence of Neil Miller, Vol. 5, 957/30, 961/20

89. Mr. Phillion, in the meantime, had been lodged in a cell. Detective Huneault went and asked him if he still wanted to meet Neil Miller. He responded that he did. He was then taken to a room in which Miller was sitting (Miller recalled that he was taken into a room in which Phillion was sitting). Miller had been given some instructions by the police on how to deal with the situation. They told him to be calm and passive at the meeting, and to avoid becoming emotional. He was told to be truthful if Phillion asked Miller about what he had told the police, but was told not to pressure Phillion to speak to the police. Miller, himself, recalled that at some point before the meeting, the police told him that Phillion wanted him to get the reward.

Evidence of Neil Miller, Vol. 5, 957/45, 965/10-25, 970/1-10
 Evidence of Detective Huneault, Vol. 5, 996/30, 1012/10 to 1013/10
 Evidence of Detective Nadori, Vol. 5, 1044/30-40

90. Neil Miller described his encounter with Mr. Phillion as lasting for a minute or two. Miller was very emotional. He was crying because, at the time, he loved Phillion. The latter was given Miller’s statement by the police which Miller watched him read. Miller was asked:

Q. And was there anything said by you or the accused to you?

A. He said, “I didn’t do it”, and well, I was in tears and I was crying and I gave him a kiss and walked out and said, “I still love you”.”

Miller thought he recalled Phillion telling him that he wanted Miller to get the reward. Phillion gave Miller \$2.00 for a bus ticket to get home.

Evidence of Neil Miller, Vol. 5, 957/30 to 958/10, 961/40, 966/30 to 968/10, 971/5, 981/10-30

91. Detectives Huneault and Nadori had their own memory of the encounter between Phillion and Miller. Huneault testified:

Q. What happened next then?

A. On entering room 205, Mr. Miller was seated as was Detective Nadori, as soon as we entered the door, the accused asked Miller what he had told us. Miller replied, "Everything you told me". Phillion said, "Everything about that particular beef?" Miller replied, "Yes." The accused asked, "Did you write it down?" Mr. Miller replied, "Yes." The accused said, "I want to see what it says". At this time I asked the accused, "Your wish is to see Neil Miller's written statement?" He said, "Yes". At that time Detective Nadori said to Miller, "Okay. Let's go." Miller stood up and walked around the end of the table, he bent over the accused and kissed him on the cheek, they whispered to each other with their heads up close, I couldn't understand what was said, for a very brief period of time – approximately thirty seconds. During the time when they were close I observed Phillion place a two-dollar bill in Miller's hand. Then he left the room – Miller left the room with Detective Nadori.

Q. Prior to and during this interview, what was Mr. Miller's condition and how did he appear to you?

A. He appeared slightly nervous.

Q. And during the interview did you notice any unusual actions on Mr. Miller's part?

A. Yes. He cried.

The officers were four feet from the two men but could not overhear them as they whispered.

Huneault was asked if he remembered hearing Phillion say to Miller, "I didn't do it".

Q. Did you ever hear Phillion say that to Miller?

A. No, sir. I do not recall.

Q. You do not recall?

A. If he said it I didn't hear it.

Q. So you don't know whether he said it or not?

A. It is quite possible. They were muttering and I couldn't hear what was said.

According to Detective Huneault, Mr. Phillion appeared serious and did not show emotion during the meeting. Both detectives were insistent that Miller had been taken out of the room before Phillion read Miller's statement.

Evidence of Detective Huneault, Vol. 5, 997/10 to 998/30, 1011/20-30, 1014/1-10
Evidence of Detective Nadori, Vol. 5, 1032/1-40, 1047/30

92. Neither Detective Huneault nor Detective Nadori knew a great deal about Mr. Roy's murder. Neither had been involved in the original investigation. Nadori had some "vague information" that Mr. Phillion "had had something to do with the initial investigation back in 1967". After taking Miller out of the room, Nadori returned with Miller's statement. It took Phillion more than five minutes to read it. Tears then came from his eyes, and he said:

"Okay. I'm ready to give you a statement. Was that guy a fireman or a policeman? I can't hang for that, can I?"

Nadori told him Mr. Roy had been a fireman. Nadori then left the room, and returned with a coffee for Phillion, and a typewriter and statement forms.

Evidence of Detective Nadori, Vol. 5, 1032/40 to 1033/40, 1051/40
Evidence of Detective Huneault, Vol. 5, 992/30, 998/30 to 999/10, 1049/20, 1050/40, 1051/40

93. Detective Nadori also looked for the "general file" on Mr. Roy's murder. He found it, but not in the place where it should have been, and brought it into the room.⁴⁷ Detective Huneault, who

⁴⁷ Detective Nadori was not asked where he actually found the file.
Evidence of Nadori, Vol. 5, 1052/40

asked all the questions of Mr. Phillion, used the file's contents for dates. The two officers and Phillion were seated around a table. Huneault testified that he took Phillion's statement by typing out his questions, reading them to Phillion and then typing his answers. The questioning began at 3:10 p.m. and was completed at 3:45 p.m. The entire statement reads as follows:

Ottawa Police Force. Start: 1510 hours.
Date – January 11th, 1972, Ottawa, Ontario.

The Accused has been cautioned by Detective Roland Huneault.

Statement of Romeo Joseph Phillion.
Date of birth 4-29-39, 1440 Mayview Avenue, Ottawa.

Before you say anything relating to the charge preferred against you, I wish to read you the following warning:

You may be charged with murder, of Leopold Roy, of 275 Friel Street, Ottawa, on August 9th, 1967. It is my duty to advise you that if you have spoken previously to any person in authority regarding this matter, and if any threats, promises or inducements were made to you prior to this time, as the result of which you felt compelled to make this statement, I wish to warn you that whatever you may have said on any previous occasions to any person in authority, you are not now obliged to repeat, nor are you obliged to say anything further, but whatever you now say may be taken down in writing and may be given in evidence.

Q. Do you understand the charge and warning?

A. Yes.

Q. Do you read, write and understand the English language?

A. Yes.

Q. Have you consumed any alcoholic beverages this date?

A. One beer.

Q. What if anything to you wish to say, in answer to this charge?

A. Well I was with my girl friend at the time, and we got into an argument, then I left her, at her mother's, then I drove around, looking for an apartment that I could go into, to steal. I got into one apartment on Friel Street, looked around inside, in which I did not find any money. I had taken a knife from the kitchen of that apartment, going down the back stairs,

I noticed a man and a woman. The man started coming down at me. I stabbed him. From there I ran to my car, that was parked on Nelson Street, and drove to the Rideau Tavern, sat down and had a few beers. Then I went back to my car and drove on King Edward Street, before that while at the Rideau Tavern I had went to the washroom and changed my clothes, that's when I drove down King Edward, slowly to the Black Bridge, on the Black Bridge I came to a stop, and threw the knife and the clothing, which consists of a pair of shoes, socks, pants and underwear. Around eleven-thirty that night I drove to Trenton, Ontario, the next day I went to Toronto and then to New Lisgar (sic), Ontario. Mr. McCombie and I don't know the other detective was come to pick me up, there I was told of the murder, and possibly be charged with it. That's the story.

Q. Do you mind if we ask you further questions regarding this charge.

A. No.

Q. Have you told anyone else other than ourselves anything about this charge?

A. Neil Miller, only.

Q. Do you recall when you spoke to him about this charge?

A. About a year ago, I mentioned a little about it to him, then I told him the whole thing, I confessed to him about three days ago, and he informed the police about it.

Q. Do you recall when this incident occurred?

A. About the murder, in August 1967, which led to this statement.

Q. Did you know the person who got murdered?

A. Yes I did, I tried to get an apartment there before, and I saw him around there.

Q. Do you know what apartment the person who was murdered lived in?

A. No, I do not, but I saw him he was cutting grass or something.

Q. Could you describe this person to us?

A. I know he was a little heavy set, maybe a little bald, he didn't have too much hair, that's about all I remember.

Q. Did you have any conversation with this person at that time?

A. I just told him to let me go, he was holding me.

Q. Did he say anything to you?

A. All I heard him say was no.

Q. Where in the building did this incident occur?

A. Below the back or side stairs.

Q. Were there any threats, promises or inducements made to you by us, in order to obtain this statement?

A. No.

Q. Will you read this statement over out loud, and if you wish to find it correct you may sign it if you wish.

A. Yes.

Evidence of Detective Huneault, Vol. 5, 999/10 to 1003/20, 1016/30 to 1017/30
Evidence of Detective Nadori, Vol. 5, 1033/10 to 1034/20, 1052/30 to 1053/10
Written statement of Romeo Phillion, Jan. 11/72, Record, Vol. 10, Tab 4

94. At the request of Detective Huneault, Mr. Phillion read most of his statement out loud, he initialed two typing errors and signed it. Huneault was of the opinion that Phillion understood his questions as he asked them and thought about them before answering. Phillion smoked continuously throughout the interview. Their conversation was in English. Detective Nadori testified that Phillion spoke solemnly and clearly, paused occasionally and appeared composed.

Evidence of Detective Nadori, Vol. 5, 1034/20 to 1035/10
Evidence of Detective Huneault, Vol. 5, 999/40, 1003/20 to 1004/20

95. Detective Huneault was cross-examined on some of the contents of Mr. Phillion's signed statement:

- Phillion claimed in his confession that he had broken into an apartment in the building and stolen a knife from the kitchen. Huneault, who had spoken to the lady who lived in Apartment 14, the apartment outside which Mrs. Roy had observed the intruder standing, agreed that, as far as the police knew, there had been no actual break-in by the intruder, and no knife had been stolen from an apartment in the building.

- Phillion told the police that “The man started coming down at me, I stabbed him”. Huneault agreed that Mrs. Roy had seen her husband coming up the stairs and meeting the intruder who was on his way down.

- As regards Phillion telling Huneault, “Oh, there was a reward. I want Neil to get it”, Huneault acknowledged that a reward had been recommended at the Inquest into Mr. Roy’s death, and had been announced in the newspaper. Huneault was further asked:
 - Q. And in that newspaper clipping there was a description of how Mr. Roy had met his death, where in the apartment building he met his death, where Mrs. Roy was when she saw them grappling. All the details were given in the newspaper on the front page.

 - A. Yes, sir. I have seen them.

 - Q. So the facts of this particular crime are really no mystery, if one read the newspaper clippings in 1967.

 - A. That’s right.⁴⁸

It should be noted that, as a result of the evidence of Mrs. Brazeau and Mrs. Barbe, the jury would have known that Phillion was frequently in the neighbourhood in which Mr. Roy lived and was murdered.

Evidence of Huneault, Vol. 5, 1006/40 to 1007/10, 1007/20 to 1008/20, 1018/40, 1019/10-30

96. Detective Huneault was asked in cross-examination if he had considered arranging for a mental check-up on Mr. Phillion in light of all the circumstances. He replied that he had not. He

⁴⁸ At the preliminary hearing, McCombie testified that the Police Commission offered a reward of \$2,500.00 for the apprehension of Mr. Roy’s killer. The reward was advertised throughout the media, including the Ottawa Citizen, The Journal and Le Droit.
Evidence of Detective McCombie, Preliminary Hearing, Vol. 4, 352/1 to 353/30, 397/10

was asked if he asked Mr. Phillion to provide him with any bodily samples.⁴⁹ He had not. He was then asked:

Q. Do you agree now that these physical facts, hair, blood, would be very important to either support or contradict the statement?

A. They would assist.

Q. They certainly would assist, *especially when all you have got is a story from a man in that frame of mind*. Isn't that true?

A. Yes, sir.

Q. It would assist you and it has been bothering you?

A. It has not been bothering me.

Q. You have thought about it?

A. Yes. (emphasis added)

About two hours after he had given his confession, on the recommendation of Detective Sgt. Norton, Mr. Phillion was given a breathalyzer test by P.C. Carroll. The result of this test was not provided in the evidence.⁵⁰

Evidence of Detective Huneault, Vol. 5, 1008/20 to 1009/40

⁴⁹ Mr. Phillion had provided hair samples on request in 1967.
Evidence of Detective McCombie, Vol. 5, 925/10

⁵⁰ The result was, in fact, a reading of zero.
Evidence of Detective Nadori, *Voir Dire*, Vol. 1, 281/40

7. MR. PHILLION’S DENIAL OF THE HOMICIDE TO P.C. COUTURE AND NEIL MILLER IN THE POLICE CELLS

97. Mr. Phillion was placed in the cellblock area of the police station after Detectives Huneault and Nadori had completed taking his statement. At 5:50 p.m., P.C. Couture, who was in uniform, was detailed to monitor him in his cell. “At about the time” when he saw Phillion, Phillion asked Couture for a newspaper. He further asked:

“Is there anything – is there something about me in it?”

P.C. Couture’s reply, if any, was not led in evidence.⁵¹

Evidence of P.C. Couture, Vol. 5, 1024/40 to 1025/40, 1026/30 to 1027/15

98. P.C. Couture had nothing to do with the investigation and did not lead Mr. Phillion to believe otherwise. Couture testified that at 10:28 p.m. he asked Phillion:

A. Question, “What do you have to do with the murder?”

Q. And was there an answer?

A. Answer, “Rien (in French), nothing at all”.

Q. Then some time between ten forty-five and eleven o’clock at night, I understand that you had occasion to be outside the cell at that time?

A. That is correct.

Q. And between ten forty-five and eleven o’clock did you ask the accused another question?

A. That is correct, I did. Question, “You must have something to do with Roy’s murder. If so, what did you have to do?” Answer, “*Nothing. The thing is that I had told Neil that if things came to worse, if I was caught in an armed robbery or if I would kill anyone in an*

⁵¹ This conversation actually occurred at 7:20 p.m. See paragraphs 147, 155 and 156 *infra*.

attempt, that I was to confess to the murder so that Neil could report it and collect the reward and that I would get half. In other words, I wanted to get even and send them on a wild goose chase”.

Q. And that was the end of the conversation?

A. That is correct.

Q. And I understand the conversation ended about 11:05 p.m.?

A. That is correct.

Q. And that you went off duty at 11:30 p.m.?

A. That is correct. (emphasis added)

In cross-examination, P.C. Couture was asked:

Q. So it was just a conversation between he and you?

A. That is correct.

Q. And it was on a level that there would appear to be a good relationship between the two of you?

A. The conversation was.

Couture told Detectives Huneault and Nadori about his conversations with Mr. Phillion that same night.

Evidence of P.C. Couture, Vol. 5, 1025/40 to 1026/20, 1027/20 to 1028/20

99. Neil Miller was himself taken to the cells and locked in a cell from some time after 2:00 p.m.

until midnight.⁵² Mr. Phillion spoke to him at one point while Mr. Miller was in his cell. Neil

Miller was asked:

Q. And did Mr. Phillion at that time – was that the time he told you that he did not commit this murder?

A. He was loose in the cell block. He came up to the cell where I was in and said something so quick that I did not understand what he said, and then I was left there and he said “I didn’t do it” and that was the end of it.

Q. And he said “I didn’t do it”?

A. Yes.⁵³

.....

Q. Mr. Miller, when you were in the cell block area and you saw the accused, and you saw him and you had a conversation with him, did you not say to the accused, “What do you keep lying for?” or words to that effect?

A. I said that on the way out. I was out of the cell and I was - - -

Q. Did you say that to Mr. Phillion?

A. I said, “I don’t know what to believe any more”, or something to that effect.

Q. All right. I am suggesting you said, “What do you keep lying for?”

A. I don’t know if I said that.

⁵² Huneault testified on the *voir dire*:

“[Miller] was asked if he wished to go to a cell and he agreed. He didn’t disagree, he just said okay. We told him we might be some time.”

It seems that Miller may not have been given any food or drink during the nine or ten hours he was in the cell. Van Camp J. held that Phillion’s knowledge of Miller’s unlawful detention in a locked cell constituted an inducement to Phillion to confess. Consequently, all statements made by Phillion in this period were ruled involuntary.

Evidence of Huneault, Vol. 1, 237/30 to 238/30
Ruling of Trial Judge, Vol. 3, 592/10-25

⁵³ The Crown later objected to these questions and answers on the grounds that what Phillion told Miller was self-serving and, therefore, inadmissible. The trial judge agreed with the Crown in this regard.

Submissions, Vol. 5, 976/20 to 979/10

Q. Pardon? ⁵⁴

A. I said, yes, “What do you keep lying for”, or, “which is it; did you or didn’t you?” I don’t know.⁵⁵

Evidence of Miller, Vol. 5, 957/30 to 958/10, 961/40, 966/30 to 968/10, 968/20 to 969/40, 971/5, 981/10 to 981/30

8. THE CASE FOR THE DEFENCE

100. The defence called a psychiatrist, Dr. Arboleda, and a psychologist, Dr. Girodo, to establish that Mr. Phillion’s confession to Mr. Roy’s murder was likely false. Dr. Arboleda qualified as a psychiatrist in 1970. His training had included one year working at the Forensic Psychiatric Clinic at the Clarke Institute of Psychiatry in Toronto. By 1975, he was in charge of both the Forensic Service of the Royal Ottawa Hospital and one of the psychiatric units within the Hospital. He also lectured in psychiatry at the University of Ottawa. He had given evidence on many occasions, both

⁵⁴ The trial judge did not allow Mr. Cogan to ask Mr. Miller what Romeo Phillion’s response was to Miller’s accusation that he was lying. On the *voir dire*, Miller had testified that Phillion did not respond to his accusation. In his testimony at the preliminary hearing, Huneault confirmed that Phillion and Miller could have communicated from their separate cells by yelling at each other.

Evidence of Huneault, Preliminary Hearing, Vol. 5, 500/30 to 501/10

See Submissions, Vol. 5, 979/20 to 980/50

Evidence of Miller, *Voir Dire*, Vol. 2, 345/30 to 346/30

⁵⁵ On March 3, 1972, Huneault reported that Neil Miller turned over several threatening letters that Phillion had written to him from the jail. Huneault continued:

“These letters were brought to the attention of the Crown Attorney Mac Lindsay and are presently held in my possession. The letters in question are of a threatening nature and may be used in evidence in the discretion of the Crown Attorney.”

These letters are not in the archives. The fact that they were never used at the trial suggests that they were not *per se* incriminating.

Investigation Report of Huneault, Mar. 3/72, Record, Vol. 2, Tab 113

for the Crown and defence. Dr. Girodo was a Clinical Psychologist by profession. At the time of Mr. Phillion's trial, he was a consultant at the Royal Ottawa Hospital, and an Assistant Professor of Clinical Psychology at the University of Ottawa.

Evidence of Dr. Arboleda, Vol. 5, 1086/20 to 1088/5

Evidence of Dr. Girodo, Vol. 5, 1066/25 to 1067/20

(a) Dr. Arboleda

101. Dr. Arboleda met Mr. Phillion on two occasions:

- on February 2, 1972 from 1:40 to 3:00 p.m.
- on October 28, 1972 from 12:25 to 1:30 p.m.

During these meetings, he found Phillion to be calm, relaxed, and "not too concerned" about the seriousness of his situation. He was cooperative and, at times, talkative.

Evidence of Dr. Arboleda, Vol. 6, 1226/20 to 1227/20, 1238/10

102. Dr. Arboleda diagnosed Mr. Phillion as having an anti-social personality disorder. Such people, he testified, are likely to have frequent run-ins with the law from an early age. They are impulsive, aggressive, lack a sense of responsibility, have difficulty in forming personal relationships, and exploit others.

Evidence of Dr. Arboleda, Vol. 6, 1227/20-45

103. Dr. Arboleda's assessment of Mr. Phillion's character and his opinion on the reliability of his confession to Mr. Roy's murder were based on the following:

- As has been explained, Dr. Arboleda interviewed Mr. Phillion twice. Dr. Arboleda did not, however, presume that Mr. Phillion was truthful in anything he told him, and so did not rely on his factual claims. Dr. Arboleda testified:

“I already mentioned I did not place too much reliance on what he told me during the interviews. As I said, I would not trust whatever he says, especially since I saw this tendency of his to boast about things. It could be that he is – the background he gave me about things he had done in the past could not have been true and I would not trust it.”

- At his first interview on February 2, 1972,⁵⁶ Dr. Arboleda examined Mr. Phillion after administering the “truth serum”, sodium amytol, to him. Dr. Arboleda described the effects of sodium amytol:

“It is a commonly used psychiatric means of gaining information when a person under treatment cannot go over certain problems, so the person is given sodium amytol and sodium amytol has the effect of depressing the cerebral cortex, which is the basis of all our restrictions and inhibitions, all of our social ways of coming across gets lowered down when a person is given sodium amytol. In some cases, it is a scientific version of what drink would do to a person. Both of them depress the cerebral cortex, then the lower centres are free to express themselves.”

Dr. Arboleda used the drug because of his belief that he could place no reliance on anything said by Mr. Phillion unless it was supported by other evidence – what Mr. Phillion said under the influence of the drug, then, meant that potentially more credence could be given to what he was saying. According to Dr. Arboleda, the drug did not, however, invariably prevent a subject from being untruthful. Dr. Arboleda placed some reliance on Mr. Phillion’s statements made while he was under the influence of sodium amytol in forming his opinions.

⁵⁶ A reading of Dr. Arboleda’s testimony suggests that he was likely mistaken in his evidence that he administered the sodium amytol to Mr. Phillion at their first meeting in February. Shortly after giving this evidence, Dr. Arboleda testified that under the sodium amytol:

“Mr. Phillion gave me practically the same story *that he had given me when he was interviewed at the old jail*. He said he had not done what he confessed he had done and insisted *again* he wanted to gain publicity.” (emphasis added)

This evidence suggests that he gave the sodium amytol to Mr. Phillion at their second meeting in October.

Evidence of Dr. Abodela, Vol. 6, 1234/10

- Dr. Arboleda relied on the psychological tests performed by Dr. Girodo (*infra*).
- Dr. Arboleda reviewed all Mr. Phillion's statements to the police, including those that had been ruled admissible, in forming his opinions. He was not, however, permitted to refer the jury to Phillion's subsequent repudiations of his confession that Van Camp J. had ruled as self-serving and, hence, inadmissible.
- Dr. Arboleda asked Mr. Cogan to arrange for Mr. Phillion take a polygraph test, which he did.⁵⁷ On Thursday, November 2, 1972, during his trial and on the day after the Crown had closed its case, Mr. Phillion underwent a polygraph examination. Dr. Arboleda told the jury that a polygraph was likely to reveal signs of anxiety typical of a person who was lying if, indeed, he was lying. He was asked:

Q. Did you compare the results of that [polygraph] examination with the results of your sodium amytol examination?

A. Yes I did, sir.

Q. And were there any differences between the two?

A. No, there is no difference.

Q. So that the results of the polygraph examination, what were they?

A. Mr. Phillion again denied, or indicated that he lied to the police when he confessed to the offence in question.

Q. And the results showed were consistent with the fact that he lied to the police?

A. Exactly.

Evidence of Dr. Arboleda, Vol. 6, 1226/20 to 1227/20, 1232/10 to 1236/20, 1238/20 to 1239/40
Submissions, Vol. 5, 1091/20 to 1094/40

⁵⁷ In his evidence on the *voir dire*, Dr. Arboleda testified that he first asked Mr. Cogan if Phillion would take a polygraph before his second interview of Phillion on October 28, 1972, and repeated it after October 28.

Evidence of Dr. Arboleda, *Voir Dire*, Vol. 6, 1151/10-20

104. Dr. Arboleda was asked to assess the reliability of Mr. Phillion's confession to Mr. Roy's murder:

Q. So that, Dr. Arboleda, on the basis of the factors you have told the members of the jury about the results of the psychological examination of Dr. Girodo, your interview, the statements made by the accused and the results of the sodium amytol or truth serum test, as well as the lie detector test, what is your opinion as to the – whether or not the accused lied when he said he confessed to the murder?

A. Well, as I already indicated, I would not trust this person in the normal way; I would not place any reliability on his normal statements, no matter what they may be. From the results of the two tests given him, I would say that they [give] support to the idea that he was actually lying to the police. That is all I can."

Evidence of Dr. Arboleda, Vol. 6, 1236/20-40

105. Dr. Arboleda based this assessment on a number of factors. He found Mr. Phillion to be "somewhat meek, somewhat insecure too, and a certain amount of effeminate behaviour in his whole demeanour". Mr. Phillion liked, however, to aggrandize:

"When I asked him what could have been the reasons for what he did, he mentioned that he just wanted to be on the radio, make the news, to be on the paper and being broadcast about. This seems to be a recurrent thing, quite often with him, in that he would like to appear as a big person to boast about things, to be important, and that seems to be part of his own personality dynamics in which he seems to need this kind of boastful behaviour as a means of enhancing perhaps his self image. As I said in my elaboration on his basic personality dynamics, I considered basically that apart from the anti-social traits and characteristics, he is a basically inadequate individual who finds himself lacking in self-esteem, has a poor self image and does not know exactly what he may contribute with and this, in some ways, creates feelings of depression that at a conscious level he finds it very hard to cope with, so he tries to enhance, perhaps, his ego, meaning himself, with this kind of statement. That is the way he likes to appear to others."

Dr. Arboleda noted that Mr. Phillion had engaged in "attention-seeking devices" including some dramatic suicide attempts involving swallowing razor blades, and a fish hook attached to a rod.⁵⁸

Evidence of Dr. Arboleda, Vol. 6, 1228/1 to 1229/30

⁵⁸ Mr. Phillion planned to pull the hook out in order to damage his insides.

106. Dr. Arboleda did not believe for a moment that Mr. Phillion confessed to the murder out of a sense of remorse:

“By definition, I doubt that these kinds of individuals are able to display remorse about anything.”

Dr. Arboleda was asked:

Q. So that would you, doctor, place any reliance or confidence on any statement he may make, unless supported by external evidence?

A. This is the type of person that I consider quite unreliable.

Q. Quite unreliable?

A. Unreliable, yes. He is the type of personality I do not believe anything they say unless there is some other facts to support or deny what they say.

Q. Would you, in your opinion, state that his emotional needs were strong enough that he would – he may falsely confess to a murder to fill that emotional need; could it be that strong?

A. This is the type of person, sir, from whom that would be expected. Persons like this, in order to make himself important and bigger, they could go to these extremes.

Evidence of Dr. Arboleda, Vol. 6, 1229/30 to 1230/35

107. In Dr. Arboleda’s opinion, much the same consideration applied to Mr. Phillion’s confession(s) to Neil Miller:

“... Mr. Phillion likes others to believe and feel that he is a big person in this respect, in a negative way, and I would say that saying this to Mr. Miller was his way of making himself big, big to Mr. Miller’s eyes and also a way of keeping Mr. Miller attached to him. As I already mentioned, these types of relationships usually take or adopt an exploitive type of pattern, in which the person tries to exploit his partner or those who have any contact with him, so it may have been ways of getting Mr. Miller afraid of what he might do to people.”

Evidence of Dr. Arboleda, Vol. 6, 1231/30 to 1232/10

(b) Dr. Girodo

108. Dr. Girodo worked with Dr. Arboleda on Mr. Phillion's case. He conducted an examination of Mr. Phillion at the detention centre on Saturday, October 28, 1972, after his trial had commenced.

He had very little familiarity with the case. His task was, in part,

“to evaluate and assess Mr. Phillion's personality and characteristics of his personality.”

He spent one and a half hours with Mr. Phillion and administered five psychological tests to him.

He found Mr. Phillion to have a character disorder which he classified as an anti-social personality with an ability on Mr. Phillion's part to demonstrate “ruthlessness or manipulateness” in his interpersonal relationships. He had “definite homosexual trends in his personality”. He found Mr.

Phillion to be emotionally and cognitively immature. He considered him to be of average intelligence.

Evidence of Dr. Girodo, Vol. 5, 1075/40 to 1077/10

109. Dr. Girodo found that Mr. Phillion had “a dramatic lack of self-image; perception of himself as a person...”. As a result, he developed a negative identity for himself:

“Somehow having a negative identity is better than not having one at all. At least it gives you a sense of who you are as a person – I mean, being able to think that you are like someone and behave like you are like someone, in a sense reinforces your own personality and gives you some kind of ego gain or status and I found in this case that was the strong suggestion, that Mr. Phillion, in terms of not wanting to remain with a lack of any identity whatsoever, it is more appropriate in his case, in terms of his personality, to make attempts to develop a negative one, finding it so difficult to develop a positive one.”

He was the type of person who liked to see his name in the newspaper, whatever the context. He would enjoy being associated with “something big like murder”. Dr. Girodo was asked:

Q. If one was searching for a positive identity, one would brag about a lot of things we did that were good for society, and one who is searching for a negative personality would say a lot of things that were anti-social; for example that he committed a lot of crimes. Is that consistent?

A. Yes. That would be consistent with that personality style I have described.

Q. So from what you have understood on your results, of Mr. Phillion having no identity at all, he appeared to be searching for a negative identity?

A. Yes.

Q. And when – would go to an extreme – you say he went right off the chart with respect to this item – so “something big like murder” would be an extreme instance of how he acted, that would be in keeping with the extreme of this man in search for a negative identity?

A. Yes. In the context in which I think you are meaning it, yes, I think it would.

Evidence of Dr. Girodo, Vol. 5, 1067/20 to 1073/35, 1077/40

110. Dr. Girodo was of the opinion that one could not rely on anything said by Mr. Phillion unless it was supported by other evidence. He was asked:

Q. And then would you look to some physical or supporting evidence to get the correctness of his statement – some supportive evidence to his statement?

A. With a person like Mr. Phillion one would have to, yes.

Q. So if he made a confession to a murder, would you then look to supporting evidence, like fingerprints or hair samples, to support whether he was telling the truth or not; would that be the kind of external evidence you would look to?

A. That would be consistent with what I said, yes.

Evidence of Dr. Girodo, Vol. 5, 1085/20 to 1086/20

9. THE TRIAL'S CONCLUSION

111. The defence closed its case on Monday, November 16, 1972. The Crown called no reply evidence. Both counsel addressed the jury that afternoon. The trial judge charged the jury on Tuesday, November 7. The jury retired at 12:08 p.m. At 12:58 p.m., after hearing objections to the charge, the trial judge recalled the jury for further instructions. At 2:17 p.m., the jury asked to be given the time and date that Neil Miller's written statement was taken and signed. At 2:22 p.m., this question was answered. At 4:45 p.m., the jury returned with three more questions:

- “(1) Did Miller's testimony mention a reward for this particular crime?
- (2) What were the specific words in the testimony of the police officers regarding the reward?
- (3) We would like to have Officer Couture's evidence read to us.”

At 5:15 p.m., these questions were answered. At 8:12 p.m., the jury returned with its verdict of guilty of non-capital murder.

Transcript, Vol. 6, 1221/30, 1244/30, 1277/30 to 1302/20, 1313/20, 1315/10 to 1317/10, 1321/10 to 1328/40, 1329/10

PART 3

EVIDENCE KNOWN TO THE CROWN AND DEFENCE BUT NOT HEARD BY THE JURY

INTRODUCTION

112. A substantial body of evidence was excluded by the trial judge at trial. This included a significant amount of evidence which was exculpatory in nature. The rulings *per se* are not challenged on this application but knowledge of the evidence ruled inadmissible is necessary for a full appreciation of the case for and against Mr. Phillion's actual innocence or guilt. The rigidity of the rule that the defence could not lead an accused's exculpatory statements into evidence (and the rule is likely the same today) helped create a miscarriage of justice for reasons that have already been commented upon by Commissioner Kaufman in his report on *The Commission on Proceedings Involving Guy Paul Morin*. As well, there was evidence known to the defence at trial that the parties chose not to lead into evidence.

"The Commission on Proceedings Involving Guy Paul Morin", Vol. 2, pp. 1151 - 1157

113. The evidence excluded was as follows:

- On January 11, 1972, the police twice took Phillion to the building in which Mr. Roy was stabbed in an attempt to have him reconstruct the crime to which he had confessed earlier that afternoon. The *Crown* sought admission of this evidence, the defence opposed it and Van Camp J. ruled it inadmissible. In hindsight, from the point of view of the defence, the exclusion of the evidence can now be viewed as unfortunate.

- Statements made to several police officers before and after Phillion’s two trips to 275 Friel Street were ruled inadmissible by Van Camp J. Many of these statements involved repudiations by Phillion of his earlier confession. *The defence* sought the admission of this evidence.
- The defence was not allowed to lead evidence that Phillion “passed” a polygraph test.

114. Other evidence was not heard by the jury that would have assisted them in fully comprehending the evidence that they did hear. In particular:

- No explanation was provided to the jury for why Phillion was arrested in the first place on January 11, 1972, and so came to be in police custody when he confessed to the homicide. Neil Miller’s statements to the police on the robbery on January 10, 1972, and on the murder on January 11, 1972, which would have provided a more useful context to the jury for Miller’s evidence than the snippets of his conversations with the police that they heard during his cross-examination, were not tendered.

This evidence either was not led at trial because Crown and defence agreed that it was too prejudicial to Mr. Phillion, or was not led at the option of the parties.

1. EVIDENCE EXCLUDED BY THE TRIAL JUDGE – THE TWO TRIPS TAKEN BY THE POLICE AND MR. PHILLION TO THE CRIME SCENE

115. After Mr. Phillion had signed his confession to Detectives Huneault and Nadori at 3:45 p.m., a further series of events took place:

- (a) he had a further conversation at 3:45 p.m. with Detective Nadori;
- (b) at 4:08 p.m., he went to 275 Friel Street with Detectives Huneault, Nadori and Norton, and attempted to reconstruct the events which led to Mr. Roy's murder;
- (c) at 7:50 p.m., he was taken to 275 Friel Street for a second time by Detectives Huneault, Nadori and Norton in another attempt to reconstruct the homicide.

After a *voir dire* was held, Van Camp J. excluded this evidence in its entirety by ruling that neither the 3:45 p.m. statement to Nadori nor the statements made to the police by Mr. Phillion during the two trips to the crime scene had been made voluntarily. She ruled that the conversation with Nadori immediately after the signing of the typed confession should be excluded because Nadori did not give Phillion a further caution. She excluded evidence of the first trip to the crime scene because she found that she had “no exact record of what occurred”. She ruled:

“It would seem to me that if the prosecution has not proved what the statements are it is impossible for me to rule that it is a voluntary statement. Consequently, I must rule that any statements made during the trip, the first trip, are inadmissible.”

Van Camp J. similarly found the record of the conversations on the second trip to the crime scene to be wanting and continued:

“... I cannot find that it was voluntary, even if I knew what the statements were, in that it was a statement made by the accused on the prompting of others, with the assistance of others and by reason of the fact that he was taken from custody a second time to the same scene, that his memory was prompted, that if it were found what he had said on that trip I could not find that it was voluntary within the definition, and so the statements of the second trip will not be admissible.

Her rulings were not unexpected because they were essentially invited by the Crown in his submissions.

116. As will be seen, the exclusion of Nadori's conversation with Phillion, and the inadmissibility of evidence of the two trips to the crime scene, deprived the jury of significant *exculpatory* evidence. While at first blush, their exclusion may have seemed to aid the defence, in the result their exclusion meant that the jury never heard a body of evidence which they needed to hear to be in a position to determine the reliability of Phillion's signed confession. In particular, the jury did not know the extent to which Phillion lacked knowledge of the crime which the real killer would have had.

(a) Mr. Phillion's Conversation with Detective Nadori
at 3:45 p.m. at the Police Station

117. After Mr. Phillion signed his confession at 3:45 p.m. in the presence of Detectives Huneault and Nadori, Huneault left the room. Nadori then asked Phillion a series of questions:

Q. How do you feel now?

A. Better. I just signed my life away. Do you know I was sent there. A guy told me that there was a gun in the apartment and money hidden in the mattress. ... I didn't find it.

Q. Did you take anything at all from the apartment?

A. A watch – something else, I don't remember.

Q. Where is the watch now?

A. It's long gone.

Q. Who told you to go to the apartment?

A. Billy. He's in the stir now, Kingston.⁵⁹

Q. What is Billy's last name?

A. I don't know. I just know him from here and there.

Q. Is he English or French?

A. French. Yes, I took the knife too.

Q. What kind of knife was it?

A. About this long [indicating a distance between his two fingers, about nine inches]. Thin blade. It had a wooden handle. The blade was kind of worn out.

Q. Like it was sharpened a lot?

A. Yes.

Q. Where did you take it from?

A. The kitchen cupboard.

Evidence of Nadori, *Voir Dire*, Vol. 1, 268/25 to 270/20

118. Phillion was to make further claims (*infra*) that he had broken into an apartment while in the building and stolen a knife. The police investigators in 1967 and 1972 all came to the conclusion that there had been no break-in. At the Inquest on November 2, 1967, Detective McCombie had testified as follows:

⁵⁹ In a police investigation report that Huneault prepared January 13, 1972, he wrote:

“Attempt to identify and interview Bill, who allegedly gave Phillion the information regarding a gun and money could be found in an apartment on Friel St., preceding August the 9, 1967. According to Mr. & Mrs. Barbe a person by the name of Bill Presley, was frequenting the Brazeau home on York St., in August of 1967, and Phillion therefore had the opportunity to meet this person at this time.”

No further reference to this appears in any later investigation reports.
Investigation Report of Huneault, Jan. 13/72, Record, Vol. 2, Tab 98

Q. What about apartment 14, did you carry on any investigation in connection with the occupant of that apartment? Did you satisfy yourself in that respect?

A. Yes, we did. We obtained the key from Mrs. Roy. We went into the apartment. The lady had been in the hospital for approximately a month prior to the 9th of August and we were quite satisfied no one had gained entry to that apartment. There were no visible marks on the door to indicate that anyone had tried to physically force their way in.⁶⁰

On January 14, 1972, Detective Huneault interviewed Mrs. Arkison, the occupant of Apartment 14.

In his investigation report,⁶¹ Huneault advised as follows:

“In relation to whether or not her apartment had been broken into and any articles removed as indicated in the original investigation, this witness indicates that to this date she has no knowledge of any entrance having been gained to her apartment and in particular no knife or items of jewellery were missing. At this time we made further inquiries as to what type of knife she had in the premises and she produced a set of cutlery which was intact indicated that these had been purchased 24 Yrs. ago when she commenced living at these premises and that she had only two other knives which would appear to be bread knives with serrated blades and these two knives were also intact.”

Evidence of McCombie, Inquest, Nov. 2/67, 33/30-40

Investigation Report of Huneault dated Jan. 14/72, Record, Volume 2, Tab 101

See Evidence of Huneault, *Voir Dire*, Vol. 1, 218/5; Preliminary Hearing, Vol. 7, 56/5

See Evidence of Nadori, Preliminary Hearing, Vol. 6, 610/40

(b) The First Trip to 275 Friel Street

119. During Mr. Phillion's confession to Detectives Huneault and Nadori, they asked him if he would accompany them to the apartment building to show them where he had stabbed Mr. Roy and where he had thrown the knife in the river from the Black Bridge. Phillion agreed to do so. They

⁶⁰ At Phillion's trial, McCombie testified that the police did not enter Apartment 14. Evidence of McCombie, Vol. 5, 903/10.

⁶¹ The investigation report would not have been disclosed to the defence. See Appendix 1

left the police station at 4:08 p.m. Detective Huneault drove. Detective Sgt. Norton, who also went with them, sat in the front passenger seat. Detective Nadori sat in the back with Mr. Phillion to whom he was handcuffed.

Evidence of Nadori, *Voir Dire*, Vol. 1, 270/30 to 271/10, 272/10
 Evidence of Huneault, *Voir Dire*, Vol. 1, 165/40

120. Huneault drove from the police station east on Daly Avenue for four blocks to Friel Street. He stopped at the intersection for twenty seconds. Phillion looked south, the opposite direction from 275 Friel Street, and then north, towards 275 Friel Street. Huneault turned north on Friel, and drove slowly, at which time Phillion looked at 275 Friel Street, a “very large building”, which was just a few yards from the car and occupied most of the block. The number “275” was plainly visible in large numbering from the police car. Phillion then said:

“I think that’s it.”⁶²

Huneault drove past the building and, as he did so, Phillion said:

“Yes, I think that’s it. I recognize the fence.”

Huneault turned west on Besserer Street and entered the laneway at the back of 275 Friel. According to Nadori, Phillion directed them to the back laneway. Huneault did not remember this.

Evidence of Nadori, *Voir Dire*, Vol. 1, 271/10 to 273/30; Vol. 2, 319/30
 Evidence of Huneault, *Voir Dire*, Vol. 1, 165/40 to 166/30, 211/40 to 212/1, 213/40
 Evidence of Norton, *Voir Dire*, Vol. 2 378/20 to 381/30, 409/10
 Evidence of Norton, Preliminary Hearing, Vol. 7, 13/20

⁶² According to Nadori’s notes, Phillion pointed out 2 Nelson Street to them but, in his testimony, he claimed that his note entry was a mistake – he testified that, in fact, Phillion pointed out 275 Friel Street,
 Evidence of Nadori, *Voir Dire*, Vol. 1, 272/10

121. In his examination-in-chief, Detective Sgt. Norton testified that neither he nor the other two officers had any “prior knowledge of the building” because none of them had previously been involved in the case. This assertion, if correct, would establish that the police were not in a position to “assist” Mr. Phillion in his re-construction of the homicide on this first trip. Norton’s claim was unconvincing for a number of reasons:

- Huneault and Nadori testified that they had the 1967 investigative file with them when they took Phillion’s signed statement. Norton, on the other hand, believed that the file was not located until much later in the day. He was, clearly, wrong in this regard.
- Huneault and Nadori undoubtedly knew the address where the homicide had occurred by the time they set out with Phillion on the first trip to the scene. By way of introduction of Phillion’s signed confession, Huneault had told him:

“You may be charged with murder, of Leopold Roy, of 275 Friel Street, Ottawa, on August 9th, 1967.”;

- Phillion first told Huneault that he had committed the murder at noon on January 11. They did not commence to take the typed confession from him until 3:10 p.m. The most inexperienced police officer, and Huneault and Nadori were veterans of the force, would have used the intervening time to acquire at least a rudimentary knowledge of the case before they began to further question Phillion; more likely, they would have read through the file and spoken to officers at their workplace who had been involved with the case in 1967;
- Huneault testified in his examination-in-chief that, after Phillion had completed his confession at the police station,

“... I asked him verbally again after the statement if he still wished to lead us to the scene at 275 Friel Street.”

In cross-examination, he modified this answer by testifying:

“I don’t recall whether I said I would take him to the scene or would take him to 275 Friel Street.”;

- Mr. Roy's murder was a highly publicized event at the time it occurred. It happened less than five blocks from the Ottawa Police station. It took place in a large apartment building. Mr. Roy was employed in a service closely related to that of the police so there was likely considerable comraderie between the two services. It defies common sense that three veteran officers (Norton with 33 years in the force, Huneault with 13 years, and Nadori with 10 years) did not know the location of the homicide, as well as its general details, before they took Phillion to the scene. On the *voir dire*, Huneault was asked:

Q. From your knowledge of the offence and certainly the newspaper clippings at the time, the apartment building was described in the papers, the address given in the papers, the location of it given in the papers and possibly even a photograph of the building put in the papers?

A. Yes.

Q. So that was knowledge that the general public would have?

A. Yes.;

- Norton had co-authored a report with Detective McCombie in 1967 regarding a potential suspect in the homicide.

In summary, Detective Sgt. Norton's position that the officers did not know the location of the homicide, or know much about it at all, when they first took Mr. Phillion to 275 Friel Street, is not credible. It was a position likely borne from a desire to avoid the suggestion that they "led" Mr. Phillion to and, perhaps, through the crime scene on their first visit to it.

Evidence of Huneault, *Voir Dire*, Vol. 1, 162/30 to 163/10, 164/40, 210/40 to 211/15
 Evidence of Norton, *Voir Dire*, Vol. 2, 376/20-40, 401/10 to 402/30, 404/5
 Investigation Report of Norton/McCombie dated Nov. 28/67, Record, Volume 2, Tab 58

122. Detective Huneault parked the police car at the back of the building, and the four of them entered through the trades entrance. Mr. Phillion was still handcuffed to Detective Nadori.

According to Huneault, Detective Sgt. Norton led the way into the building. Huneault continued:

“We went down to the basement; we walked very slowly, the accused was making observations, appeared confused once inside the premises.”

Huneault was unable to remember whose idea it had been to go down the back stairs to the basement first. Nadori testified that Phillion led the way into the building, not Norton. According to Norton himself, Phillion told them on their arrival that he had entered the building on August 9 through the rear door. Norton testified:

“We had gone around [the building] so we were in a position to see this rear door and then he further indicated that that was the door and that was the way he both went into the building and came out of the building and at that juncture we parked the car and went into the building with the accused.”

Phillion was, Norton testified,

“reasonably sure about the building when he came to it; he was sure he had gone in the rear entrance when we came to it ...”

Evidence of Nadori, *Voir Dire*, Vol. 1, 273/30; Vol. 2, 319/40 to 321/20

Evidence of Huneault, *Voir Dire*, Vol. 1, 166/30 to 167/5, 213/20-40

Evidence of Norton, *Voir Dire*, Vol. 2, 381/30 to 382/30, 400/30

123. From the basement, they went up to the second floor via the back stairs. Huneault was unclear who led the way. He was asked:

Q. In your examination in chief you told us that the accused was led up the rear staircase to the second floor?

A. Yes.

Q. Now, by that statement I take it that Nadori was ahead of the accused, when you say he was “led up to the second floor”. “On the first visit he was led up the rear staircase to the second floor.”

A. The staircase has room for two persons. Detective Nadori or Detective-Sergeant Norton was either in the lead or walking by his side and I was at the rear.

Q. But you said the accused was led?

A. Was led or led.

Q. In either case I take it that you mean that someone was showing him where – or bringing him some place. Would that not be a reasonable inference from your words?

A. Not necessarily.

Q. I see. One can take from that that the accused was leading someone else?

A. It could be.

Huneault thought Phillion looked “confused” once inside the building. He was cross-examined at the *voir dire* on his evidence at the preliminary hearing:

Q. Do you remember being asked at page 497, line 44:

“Q. Did he act like a person who wasn’t familiar with the surroundings; would that be fair?

A. Yes.”

Do you remember being asked that question and giving that answer?

A. It is possible.

Q. It is possible, and if you did give that answer is that answer true?

A. Well, “familiar” is – I don’t know how to It could be he was unfamiliar or that he was confused.

Norton also remembered that they went up the back stairs. Nadori disagreed with Huneault and Norton. He recalled that Phillion led them up the *main* staircase to the second floor – “He always led”.

Evidence of Nadori, *Voir Dire*, Vol. 1, 274/20 to 275/40; Vol. 2, 321/20

Evidence of Huneault, *Voir Dire*, Vol. 1, 166/30 to 168/30, 214/20 to 216/40

Evidence of Norton, *Voir Dire*, Vol. 2, 382/20 to 384/1

124. At the top of the stairs on the second floor, Mr. Phillion pointed to Apartment 18 at the south end of the building and said that he thought that was the apartment he had broken into and stolen a

knife. According to Huneault, he was uncertain about which apartment. They then went downstairs via the main staircase. Huneault testified:

“On the landing between the first and second floors [on the main staircase] he stopped and pointed to the newel ⁶³ on the corner post. At this time he stated this is where he had stabbed Mr. Roy, demonstrated how he had been coming down the stairs, how Mr. Roy had been coming up and they had met at that particular landing, how Mr. Roy had placed his hand on the corner post and pinned him to the corner of the railing and demonstrated how he had had conversation with Mr. Roy, had asked him to let him go, then how he had freed his right hand and in a motion with his right hand made a motion towards where Mr. Roy would have been standing in a thrusting motion and indicated that that is where he had been stabbed, Mr. Roy.”

Huneault could not recall whether Phillion told them he had the knife in his hand all the time he was in the building.

Evidence of Huneault, *Voir Dire*, Vol. 1, 168/20 to 169/40, 216/30 to 217/5; Preliminary Hearing, Vol. 5, 500/20

125. Norton testified as follows:

A. Having shown us [the apartment on the second floor] he took us down the *front* staircase and stated that that was the way he made good his escape, but that he had encountered a man at the foot of the staircase who attempted to stop him by putting his hand on the fancy newel at the bottom of the staircase, thereby sort of blocking his exit and he indicated to us that he used a knife he had taken from the apartment he had broken into to stab this man and he went through an underhanded motion of stabbing a person who might be there. He more or less gave us a visual demonstration of the stabbing that took place on the day of the murder.

Q. And you have indicated this happened at the bottom of the - - -

A. Main staircase.

Q. Were you more or less in the basement?

A. Yes. At the bottom of the staircase, as far as you can go.

Mr. Cogan: That does not answer the question. You said the bottom of the staircase - - -

⁶³ The newels on the main staircase were ornamental. There were no similar ornamental newels on the back staircase. According to Huneault, Phillion recalled seeing the “fancy” newels on the main staircase as he fled.

Evidence of Huneault, *Voir Dire*, Vol. 1, 221/30; Preliminary Hearing, Vol. 5, 498/10 to 499/10

A. Yes. I added to that “as far as you can go”. At the very bottom of the stairwell in the basement.

.....

Mr. Lindsay: On the way down the main staircase, Sergeant, did you stop at any time or did you continue right to the basement?

A. No. We did everything deliberately, because the accused seemed to be looking around at all times to refresh his memory and indicated that to us; indicating that there was a lapse of time, you know, five and a half years had passed since the time of the event and he wished to refresh his memory, so everything was fairly deliberate.

Q. And the question was, again: did you stop on the way down the main stairs or continue to the bottom?

A. It is hard to say whether you would consider it stopping. We took our time going down the stairs on this occasion and we did, in fact, stop at the bottom and had this demonstration given to us by the accused.

Q. And the conversations you have indicated, did they take place at the bottom of the stairs or on the way down the stairs?

A. On the way down the stairs.

Q. And how long would you have stopped at the bottom of the stairs?

A. Oh, a minute, a minute and a half. I wouldn't say with certainty, but it was not a great length of time. (emphasis added)

Huneault and Norton differed, therefore, as to whether Phillion showed them that he stabbed Mr. Roy on the main staircase landing between the main floor and second floor (Huneault) or at the bottom of the main staircase landing in the basement (Norton). Nadori had no memory of what happened after Phillion pointed out an apartment(s) on the second floor, except he recalled Phillion pointing to an ornament or newel on the main staircase in the basement and saying that “it appeared to be wrong”.

126. Detective Huneault explained why they had taken Phillion to the scene and his impression of Phillion's re-enactment on the first visit.

Q. Now, you and Detective Nadori decided to take the accused to the scene as a result of what was discussed in the written statement?

A. Yes.

Q. And did you take him to the scene in order to confirm in your own mind as to whether or not this man was the man involved; did you want to find some assurance?

A. Partially, yes.

Q. And is it fair to say that after the first trip, at least, that he appeared to be quite confused?

A. Yes.

Q. So that the first trip, if anything, did not satisfy you that this was the man involved. Is that a fair statement?

A. I was satisfied that he was confused.

Q. You were satisfied that he was confused; not consistent with a person who appeared to have been there before?

A. He appeared – from his first trip, he appeared to have some knowledge of the premises. (emphasis added)

Defence counsel pointed out to Huneault that Phillion's mother had lived on Nelson Street, five blocks from where the homicide took place, for many years, and that Phillion had lived with her for some of that time.⁶⁴ He would, therefore, have been very familiar with the area, including the building at 275 Friel Street.

Evidence of Huneault, *Voir Dire*, Vol. 1, 209/40 to 210/20

⁶⁴ In fact, he had been arrested at his mother's apartment on Nelson Street that morning. Evidence of Huneault, Vol. 5, 993/40

(c) The Departure from 275 Friel Street after the First Visit

127. Mr. Phillion and the police left the building through the rear exit. Phillion told them that after fleeing the building, he ran into the laneway off Friel Street, went behind some houses, negotiated a white picket fence and escaped in his car which he had parked on Nelson Street. According to Norton, the police drove the route as Phillion explained it to them. Norton also remembered Phillion telling them that he was wearing a dark blue windbreaker, black pants, a red shirt⁶⁵ and black shoes. The police asked Phillion to show them where he had disposed of his clothing and the knife. They drove to the Minto Bridges (it was not suggested that Mr. Phillion directed them there) about a half a mile from 275 Friel Street. Huneault testified:

“... we went down King Edward Avenue to the area of the Minto Bridges. This is a series of two bridges running east and west and at the entrance to the most westerly bridge, travelling in an easterly direction, he indicated just as we entered on to the bridge that he had stopped at that location on August 9th , 1967; that he was driving his Ford convertible car, that the top was down and that the clothing which he had worn during the commission of the offence and the knife which he had used, that he had thrown these into the river while seated in the vehicle. He just simply slid himself across the seat and threw it through the open grill work which is on the side of the bridge. He also indicated that at that time there was a vehicle which had pulled up behind him and had to stop while he was doing that.”

Evidence of Nadori, *Voir Dire*, Vol. 1, 276/40 to 280/40
 Evidence of Huneault, *Voir Dire*, Vol. 1, 169/40 to 171/30
 Evidence of Norton, *Voir Dire*, Vol. 2, 386/20 to 387/40

128. In his signed confession earlier that day, Phillion had told Huneault and Nadori that he had driven to the Black Bridge and had thrown his clothes and the knife from there into the water.

⁶⁵ At the preliminary hearing, Nadori testified that he recalled Phillion saying he was wearing a black shirt.
 Evidence of Nadori, Preliminary Hearing, Vol. 6, 621/40

Detective Sgt. Norton recalled that Phillion, once again, at first claimed to have thrown his clothes from the Black Bridge. Norton testified:

“ We were directed by [Mr. Phillion] down to King Edward Avenue to some bridges. He indicated to us first an old railroad bridge that is now partially dismantled and stated he thought he had thrown a bundle of clothes that in the meantime he had removed in a tavern somewhere, and the murder weapon – stated that he had thrown this from the bridge into the river. *I suggested to him that he would not be able to drive on that bridge because there was no traffic, it was a train bridge and it was not suitable for traffic.* The Minto Bridges, which are perhaps three hundred, four hundred yards beyond the railroad bridge were observed by him and he said, “That is the bridge.” (emphasis added)

Norton was correct in what he told Phillion – the Black Bridge, which had been dismantled but for its original pillars by 1972, had been a railway bridge.⁶⁶

Evidence of Huneault, *Voir Dire*, Vol. 1, 171/1-10
 Evidence of Norton, *Voir Dire*, Vol. 2, 387/40, 388/20

129. Detective Sgt. Norton remembered further conversation with Mr. Phillion at this time. He testified:

“He was further asked what he did beyond this and I have not got a note of who asked him, *but he stated that he left town by Highway 17 and that he pawned the suitcase for gasoline at a Shell Service Station at the Ottawa side of the village or town of Arnprior; he further stated that the Ontario Provincial Police stopped him about five minutes – one mile ... I don't know how slow he was driving, five minutes or one mile from this gas station and he stated that the officer charged him with speeding, told him he had unsafe tires and allowed him to go after serving a notice on him⁶⁷ and indicated that he went to Toronto via Trenton and further he travelled on to New Liskeard, Ontario, and that is what I remember during conversation on that occasion when we had him out.*” (emphasis added)

⁶⁶ In contrast to Norton’s evidence, Nadori testified at the preliminary hearing that Phillion talked as if he thought the Minto Bridges were called the Black Bridge.
 Evidence of Detective Nadori, Preliminary Hearing, Vol. 6, 620/20 to 621/30

⁶⁷ At the preliminary hearing, Norton testified that Phillion also told him that the officer pointed out to him that he had no insurance.
 Evidence of Norton, Preliminary Hearing, Vol. 7, 5/40

As will be seen, the archival materials give context to these claims. They were a mixture of fact and fiction. Most importantly, Phillion was not stopped by the OPP *the night* of the murder, but between 6:00 and 6:30 p.m. on *the day before* the murder. In this statement to Norton, he moved the timing of this, and his pawning of his suitcase at a gas station, forward by one day.

Evidence of Norton, *Voir Dire*, Vol. 2, 388/10-45

(d) The Events at the Police Station on Their Return –
The Police Assessment of their First Visit to Friel Street

130. On their return to the station after the first trip to the scene, Mr. Phillion was given a breathalyzer test. His reading was zero. Lt. McCombie was, by this time, at the police station.

According to Detective Sgt. Norton, they

A. ...perused the files very briefly and decided that we should give the accused another opportunity to direct us through the building again, because the story that he had told us initially was not exactly the same as the facts that were shown in the file.

Q. When you say the story he told you initially, which story is that?

A. That is the story of his entrance and exit from the building and the apartment that was burglarized did not exactly meet with the facts that were shown in the file.

.....

A. ... briefly we went through the facts at this time in 1967, compared them with what was known by the accused when we made our visit to 275 Friel and they did not add up.

In his undisclosed January 12, 1972 investigation report, Norton wrote that, after the first trip, they returned to the station and Phillion was placed in the cells:

“After this I had a conference with Lieut. McCombie who had handled the file initially in 1967 and he remarked that the actual offence had not taken place on the staircase indicated by Phillion to us and that the stabbing took place in the rear service staircase which are not far distance from the main staircase. As a result of this Phillion was removed from the cells and driven by us back to 275 Friel ...”

Nevertheless, Norton felt that Phillion “had given us enough facts that he might very well be the right man”. Detective Nadori was a little more blunt in his testimony. He said they took Phillion back to the scene:

“Because following we have looked at the facts as they were revealed during the initial investigation *and we concluded that whatever Romeo showed us was completely opposite of what is actually supposed to have taken place.*

.....

As I say, when we were there with him the first time and had reviewed the report, as I mentioned, he led us to places in the apartment building that had no significance whatsoever.” (emphasis added)

Investigation report of Norton, Jan. 12/72, Record, Vol. 2, Tab 97, p. 2
 Evidence of Nadori, *Voir Dire*, Vol. 2, 281/40, 324/30 to 325/35
 Evidence of Norton, *Voir Dire*, Vol. 2, 389/30 to 391/10, 411/10

131. Nadori was quite correct. Phillion’s “re-enactment” of the homicide contained numerous problems:

- The intruder had likely entered by the front door of the building (perhaps using a credit card, or taking advantage of someone else entering the building) and proceeded upstairs not, as Phillion claimed, through the back door and then descended to the basement. If the intruder had come in the back door and gone down to the basement, he would likely have encountered Mr. or Mrs. Roy or Mr. Herbert before he ever went upstairs.
- The intruder likely went up to the second floor from the first floor by the main stairs, not, as Phillion claimed, from the basement by the back stairs, because using the main stairs would have been the quickest and most direct route.

- The intruder was seen by Mrs. Roy standing outside Apartment 14 which was the opposite end of the hallway from Apartment 18, the one indicated by Phillion to the police.
- The intruder did not break into any apartment, and nothing was stolen. Phillion's claims that he broke into "the" apartment and stole a knife, which became the murder weapon, and a watch, were fictional.
- The intruder fled down the back stairs not, as Phillion claimed, down the main stairs.
- Mr. Roy was stabbed on the landing between the first and second floors on the back stairs not, as Phillion claimed, on the landing between the first and second floors on the main stairs (Huneault's testimony) or at the foot of the main stairs in the basement (Norton's testimony).
- The intruder fled out of the front door of the building (Mrs. Robitaille's testimony) not, as Phillion claimed, out of the back door.
- The clothing that Phillion claimed to have been wearing did not match the description provided by Mrs. Roy and Mrs. Robitaille.

Detective Sgt. Norton testified that, on their perusal of the police file, they quickly realized at least some of these problems.

Evidence of Norton, *Voir Dire*, Vol. 2, 390/30-45, 410/1-40

(e) The Second Trip to 275 Friel Street

132. The police decided to take Mr. Phillion back to 275 Friel Street. Huneault put it this way:
"...we decided to see if the accused would return with us and possibly assist us and himself."

They left the station at 7:35 p.m. (Nadori) or 7:50 p.m. (Huneault). Nadori was, once again, handcuffed to Phillion. Huneault testified:

“On this occasion we drove directly to the front of the building at 275 Friel, entered by the front door. The accused at that time indicated that he recalled that the front door had been opened in 1967.”

Huneault had to go around the back to open the front door from the inside. According to Nadori, this was their plan – to enter the building by the front door (which had not been the door by which Phillion claimed to have entered on their first trip) and see where Phillion went from there. As they were let in from the inside by Huneault, Phillion said that he had gone in by the front door on the day of the homicide, and that it had been open at the time.

Evidence of Norton, *Voir Dire*, Vol. 2, 392/20-40
 Evidence of Nadori, *Voir Dire*, Vol. 2, 325/30-40
 Evidence of Huneault, *Voir Dire*, Vol. 1, 172/30, 175/10

133. According to Detective Huneault, they then all walked up to the second floor. Detective Sgt. Norton led the way. When they reached the second floor, Mr. Phillion pointed to Apartment 14 and said that was the apartment that he had broken into. Huneault continued:

“After showing us in what appeared to be a more sure manner, apartment 14, the one he had broken into, he also showed us where he had observed Mrs. Roy or a woman standing and showed us the path he had taken from in front of apartment 14 to the rear staircase; how he had went down the rear staircase to the landing between the first and second floors. This time he seemed more sure that this was his route and not the one he had explained in the first instance. Again demonstrated at the landing between the first and second floors where he had met Mr. Roy, went through the motions on where he had stabbed him, how he had stabbed him, then how he had run from the building out the back door.

.....

He demonstrated, as in the first instance, how he had been pinned to the bannister or railings. He looked at the corner post which was elevated approximately two inches and with no fancy ornament on it, and he indicated this was where the incident occurred and not on the front staircase and indicated that after stabbing Mr. Roy he had run out through the back door.”

Evidence of Huneault, *Voir Dire*, Vol. 1, 172/30 to 175/10; Preliminary Hearing, Vol. 5, 474/35

134. Detective Nadori testified that Mr. Phillion led them to the second floor. He claimed that when Phillion “made references” to Apartment 14, one of them asked “Why didn’t you take that hallway?”, indicating the main stairs as an avenue of escape.⁶⁸ Phillion responded that he fled by the back stairs because “There was a lady coming up or had already come up those stairs at the time...”.⁶⁹ On the way down, he encountered the deceased and stabbed him. Nadori described Phillion’s “re-enactment” of the stabbing:

“Mr. Roy blocked his avenue of escape by putting his arm across this way and holding on to the railing of the stairs, at the same time grabbing one of his arms with his; Mr. Roy grabbed his arm with the other hand and there was conversation, if I recall, to the effect that Romeo asked him to let him go and Mr. Roy declined and then for some reason I cannot recall at this point Mr. Roy also grabbed him by the hair – with another hand or with the same hand I do not know, and then Romeo – at this point Romeo was asked to demonstrate [with Norton]. ... Norton with one hand, as a result of the directions he received from him, grabbed the stairs with the other hand, grabbed Romeo by the arm and then grabbed Romeo by the hair. At this point Romeo was partially with his back towards Norton and then when he was grabbed by the hair he demonstrated a full-house – a round-house swing, turning around his own centre in a three hundred and sixty degrees centre, with his arm outstretched, hitting Norton in the area of the left chest.”

Evidence of Nadori, *Voir Dire*, Vol. 1, 283/10 to 285/40

⁶⁸ It should be recalled that on the first trip, Mr. Phillion had told the police that he fled down the main stairway. Yet, Nadori did not suggest that, before asking this question of Phillion, Phillion had already told them that he had not fled down the main stairway. Consequently, Nadori’s question of Phillion was highly suggestive.

⁶⁹ According to the police evidence on the *voir dire* at trial, Phillion did not mention seeing a woman (Mrs. Roy) on his first trip to the building. Huneault and Norton, both of whom prepared investigation reports on the trip, reported nothing about Phillion saying that he saw a woman in the building on this trip. However, Huneault in his evidence on the preliminary hearing, testified that, during their first visit to the building, after pointing to Apartment 18 Phillion said that was “when he first seen Mrs. Roy, or she had approached him”. On the *voir dire* at trial, he did not repeat this, and neither Norton nor Nadori made any similar claim on the preliminary hearing or during their evidence on the *voir dire* at trial. It seems reasonable to conclude that Huneault’s evidence at the preliminary hearing was in error insofar as the first visit to the building was concerned, particularly in view of Detective Sgt. Norton’s evidence that he was the only one taking notes.
Evidence of Huneault, Preliminary Hearing, Vol. 5, 470/50

135. Detective Sgt. Norton’s version of the events was as follows – on going to Apartment 14 on the second floor, Phillion said “I think it was here”. Nadori asked him:

“Did you see anybody on this floor?”

Phillion said he saw a woman who was blocking the main staircase. He ran past her to the back stairs and encountered the deceased on the way down. Norton was asked where Phillion said the struggle took place. He replied:

A. On the landing *between the first floor and the basement*⁷⁰ – that is the main floor and the basement, and he indicated to us that the struggle took place there.

Q. Can you remember the conversation at that time?

A. Well, I have made notes that he indicated the man caught up with him and held him first by the windbreaker or shoulder and then by the hair and at the same time he was blocking his exit by holding on to the newel of the staircase.

Q. Can you describe the newel to us, please?

A. The one on the main staircase was very fancy; this one is not so ornate, it is flatter, hard to describe. (Emphasis added)

However, he further stated that on neither visit was Phillion “really positive about the exact area that this struggle took place”.

Evidence of Norton, *Voir Dire*, Vol. 2, 392/40 to 397/20, 416/20

136. As has been seen, on the first visit, Mr. Phillion’s attempted re-construction had had little to do with reality. Among other errors, he had himself entering the building through the “wrong” door, going up the wrong stairs, encountering and stabbing Mr. Roy at the wrong level of the wrong staircase, fleeing down the wrong stairs and escaping from the building through the wrong door.

⁷⁰ In fact, Mr. Roy was stabbed one floor higher, on the landing between the first and second floors.

After the three officers reviewed the contents of the police files on the homicide, and then returned to the building with Phillion, he became able “to correct” the majority of his errors and gave a description of events that to some degree matched the circumstances of Mr. Roy’s murder. In these circumstances, it is important to examine the evidence of the three police officers as to the extent to which they “assisted” Mr. Phillion, if at all, in his attempted enactment of the crime on the second visit to the building.

137. At a general level, the officers insisted that they tried not to influence or assist Mr. Phillion.

Detective Sgt. Norton testified:

“We always had Nadori leading [as we went through the building for the second time], because we wanted the accused to show us rather than we show him, and then Huneault and I would follow behind.”

However, Norton acknowledged that their newly acquired knowledge between visits likely helped Phillion. Norton was asked in cross-examination on the *voir dire*:

Q. And would you agree with me that if there was any more certainty in the mind of the accused about certain areas in the building *it was partly due to the fact that you yourselves knew more about the interior of the building. Would that be a fair statement?*

A. *Yes, and also – that would be fair enough*, but we would also like to give him a second opportunity of looking at the building. You see, as I previously have stated in my examination in chief, he did inform us that the period of time of over five years had passed and he could not recall clearly the events at that time. (emphasis added)

Huneault was asked a series of similar questions at the preliminary hearing:

Q. And I suggest to you that the accused, from your own impression, appeared to be more certain of locations of where events took place due to the fact that you and Detective Sergeant Norton and Detective Nadori had familiarized yourselves with the general file and you yourselves in your own minds were more satisfied where events took place, as well?

A. Yes.

.....

Q. There was a discussion generally about both you giving the information that you had and both (sic) the accused coming up with the information?

A. Correct.

Evidence of Norton, *Voir Dire*, Vol. 2, 396/10, 409/30-40
Evidence of Huneault, Preliminary Hearing, Vol. 5, 504/20-40

The Photograph in Detective Sgt. Norton's Possession

138. Detective Sgt. Norton took a number of photographs from the investigation file with him on the second visit. These were photographs taken of the interior of the building by P.C. Storey in 1967. Norton showed one of them to Mr. Phillion as they went through the building. There was considerable confusion in Norton's evidence as to which photograph he showed Phillion but, according to Norton, whichever photograph it was, it showed some of the bloodstains on the back staircase but was not one of the photographs that showed any part of Mr. Roy's body.

Evidence of Norton, *Voir Dire*, Vol. 2, 411/10 to 417/30

139. Norton testified that he showed the photograph to Phillion "when we got to the staircase where he indicated the struggle took place with the man that attempted to stop him". He further said:

A. When we were near this landing the accused seemed hesitant about this area and I thought perhaps the picture of it as it then was – it had not changed, might or might not refresh his memory and I took one of the photographs from the group I was carrying with me and showed it to him for whatever value it might have had.

Q. Was this before you reached the landing between the basement and the ground floor?

A. No. It was in that area, when he was trying to find his way to the area that he felt this had taken place and he was not sure about landings. He seemed to have the same problem finding them as I did explaining them. They have a sameness about them – there are X (sic) number of steps on each one and they looked pretty similar going up and down.

Norton showed the photograph to Phillion before he demonstrated how he stabbed Mr. Roy.

“I asked him would it be of any help if I showed him the photograph and he was not sure whether it would or not, but he accepted the photograph and looked at it.”

Apart from showing him the photograph, Norton insisted that he neither did nor said anything to assist Phillion’s memory.

Evidence of Norton, *Voir Dire*, Vol. 2, 393/30, 398/10 to 399/40

140. Huneault was also questioned about Norton showing a photograph to Phillion. His answers were confusing. He was asked on the *voir dire*:

Q. What did you do when you got to the basement?

A. That, I believe, is when he was shown a photograph, if he was shown a photograph. I handed a photograph to Detective-Sergeant Norton.

Q. Where did you do that?

A. In the basement area, right near the back door.

Q. From what you observed, did the accused see it?

A. I can’t be sure, but I believe he did.

Q. Do you remember any of the conversations surrounding that, if there was any?

A. I believe he was asked by Detective Sergeant Norton if he would compare the photograph that he was shown to the location where he was.

Q. And then what happened after that?

A. *After he was shown the photograph he seemed more sure of himself of the location where the incident occurred and subsequently we were – Detective Sergeant Norton and myself were satisfied that this had assisted him and we left the premises.*⁷¹ (emphasis added)

Evidence of Huneault, *Voir Dire*, Vol. 1, 177/30 to 178/10

⁷¹ Nadori testified that he had no memory of a photograph being shown to Mr. Phillion on the second visit.
Evidence of Nadori, *Voir Dire*, Vol. 1, 286/10

141. At the preliminary hearing, Huneault had been asked:

Q. Had [Phillion] seen photographs between the first and second time of going to the apartment?

A. I had a group of photographs with me; I believe one photograph was shown.

Q. To the accused?

A. I gave it to Detective Sergeant Norton, one photograph.

Q. What was that of?

A. Of the staircase, I believe.

On the *voir dire* at trial, Huneault testified that he had been incorrect in these answers. His trial testimony included the following exchange:

Q... At the first visit [Phillion] was apparently confused and had the stabbing take place at the front staircase between the first and second landing?

A. Yes.

Q. And on the second visit he was shown a photograph of the rear staircase with blood on every stair, I put it to you?

A. There was a small amount of blood there possibly.

Q. And I put it to you, if he saw that photograph, after seeing it there would be absolutely no doubt where the stabbing took place?

A. No, sir.

Q. Why was he shown the photograph?

A. He led us through the building before he was shown the photograph the second time.

Q. Then why was he shown the photograph?

A. I don't know whether he was shown the photograph or not.

142. Elsewhere in his testimony at the preliminary hearing, Huneault had testified that the photograph might have been shown to Phillion *before* they went upstairs on the second visit:

Q. And the photograph [of the back staircase] was shown to the accused, I suggest to you, and it was suggested to him that it was on the back staircase that the incident happened?

A. It's possible.

Q. And the accused then, did he correct himself, or you don't recall any discussions about it?

A. No; I don't recall any discussion about it.

Q. Then the next thing that happened was you went upstairs?

A. Yes. (emphasis added)

When confronted with this part of his testimony from the preliminary hearing, Huneault concluded that he was "not sure" whether, on the second visit, the photograph was shown to Phillion before they went up to the second floor.

Evidence of Huneault, *Voir Dire*, Vol. 1, 220/40 to 222/20

Other Aspects of the Second Trip to 275 Friel Street

143. Huneault acknowledged the possibility that Phillion had been given some "reminders" on the second visit:

- he agreed that it may have been suggested to Phillion that Mr. Roy had been stabbed on the back staircase. It should be recalled that Phillion had told the officers on their first visit that he had stabbed him on the main staircase,
- he agreed that Phillion may have been told that he was "wrong" when he had pointed to Apartment 18 on their first visit.

Huneault was then asked:

Q. So we do not get the wrong impression, is it fair to say if he was more certain in pointing out things the second time part of that would have been as a result of assistance given to him by detectives who themselves became more familiar with the file?

A. It is possible, yes.

Q. And even on the second visit you are not suggesting that the accused walked into the building and said, "This happened here; that happened there" and so forth. You are not suggesting that certainty was in the mind of the accused?

A. No.

Q. And would it also be fair to say that even after the second visit, that the accused still appeared to be confused and more specifically on the second floor?

A. He appeared more certain on the second visit.

.....

Q. So you would agree with me that even on the second visit on the second floor the accused appeared to be confused still and you noted that in your book?

A. Yes.

Evidence of Huneault, *Voir Dire*, Vol. 1, 221/30 to 223/40; Preliminary Hearing, Vol. 5, 499/10

144. There was one significant aspect of the actual events of August 9, 1967 that Phillion continued to get "wrong", even on this second trip. The actual intruder was seen to flee out the front door by Mrs. Robitaille and Mrs. Florence Gagne. Mrs. Gagne had testified at the Coroner's Inquest but was not called at trial. She was in her home at 325 Besserer Street during the afternoon of August 9. From her kitchen window, at about 2:50 p.m., she saw a man run out of the front door of 275 Friel Street, run across the lawn and jump over the railing. He was wearing dark clothing and had dark hair. About ten minutes later, she saw the police arrive. Yet, on both trips, Phillion told the police that he had fled through a red door.

Evidence of Norton, *Voir Dire*, Vol. 2, 395/30 to 396/20
Evidence of Huneault, *Voir Dire*, Vol. 1, 174/30

Evidence of McCombie, Preliminary Hearing, Vol. 4, 398/35
Evidence of Mrs. Gagne, Coroner's Inquest, 25/30 to 27/10
See also Somers and Hanna Investigation Report, Aug. 11/67, Record, Vol. 2, Tab 19

145. Phillion was then returned to the police cells at 8:20 p.m. after the second trip to 275 Friel Street.

Evidence of Huneault, *Voir Dire*, Vol. 1, 178/20

2. EVIDENCE EXCLUDED BY THE TRIAL JUDGE – MR. PHILLION'S SUBSEQUENT REPUDIATIONS OF HIS CONFESSION

Introduction

146. The jury was unaware that on March 25, 1971, Mr. Phillion had gone to see Detective McCombie at the Ottawa Police Station to tell him that his brother Donald, who was in penitentiary serving life imprisonment for murder, wanted to confess to Mr. Roy's murder. McCombie went and saw Donald who denied what Romeo was telling them (*infra* paragraph 254).

147. Nine months later, Phillion confessed to the crime himself. He then repudiated his confession to several officers, and his mother, in the hours after he confessed. The jury only heard part of his repudiation to P.C. Couture. The following is a chronology of the relevant events that puts his recantations into context:

January 11

Around noon: Huneault asked Phillion if he had anything else to tell them. Phillion told him that he committed the murder.

Around 2:45 p.m.: Phillion was brought into the interview room in which Neil Miller was sitting. After a short conversation, Miller was taken out of the room.

From 3:15 – 3:45 p.m.: Phillion provided his confession to Huneault and Nadori, which he then signed.

3:45 p.m.: Phillion spoke to Nadori alone, and told him that he had stolen the knife with which he had stabbed Mr. Roy, and a watch, from an apartment at 275 Friel Street. This statement was ruled inadmissible as being involuntary (*supra*, paragraph 115).

4:08 p.m.: Huneault, Nadori and Norton took Phillion to 275 Friel Street. This was the first attempt at having him re-enact the crime. Phillion was then taken back to the police station. The statements made by Phillion on this trip were ruled inadmissible as being involuntary.

Around 5:00 p.m.: Nadori questioned Phillion about the attempted taxi driver robbery. This evidence was not heard by the jury.

5:00 and 5:25 p.m.: Phillion was given two breathalyzer tests. The jury heard evidence that these tests were given but were not told the results.

5:50 p.m.: Phillion was placed in the cells where he was monitored by P.C. Couture. At 7:20 p.m., he asked Couture if there was anything about him in the newspaper. The jury heard this evidence (*supra*, paragraph 97).

7:50 p.m.: Phillion was taken for a second visit to 275 Friel Street by Huneault, Nadori and Norton to re-enact the crime again. He was then taken back to the station. The statements made by Phillion on this trip were ruled inadmissible.

8:21 to 8:43 p.m.: Phillion was placed in a cell at the police station and then taken out briefly at which time he was charged with non-capital murder.

10:20 p.m.: On his return to the cells, Couture continued to monitor him. Phillion was allowed to telephone his mother, and Couture eavesdropped during the conversation. Phillion told his mother that he had not committed the murder. This event was ruled inadmissible.

10:28 p.m.: Couture had a conversation with Phillion which included Phillion's first recantation to a police officer. The recantation was ruled admissible and heard by the jury. The balance of the conversation was not heard by the jury.

January 12

7:30 a.m.: Detective Sgt. Norton removed Phillion from the cells and interviewed him in a nearby room. The contents of their conversations were bizarre because Phillion admitted and then denied the crime all in the space of minutes. This conversation was ruled inadmissible as being self-serving for Phillion.

7:47 a.m. and 10:20 a.m.: P. C. Aldrich, who was then monitoring Phillion in the cells, reported that Phillion recanted his confession in a conversation with him. This conversation was ruled inadmissible as being self-serving for Phillion.

12:30 to 1:50 p.m.: P.C. Bayne was the custodial officer in this period. Phillion repudiated his confession again. The conversation was ruled inadmissible as being self-serving for Phillion.

1:50 to 5:30 p.m.: Aldrich returned to continue monitoring Phillion. Phillion asked if he would be taking a lie detector test. The trial judge ruled this to be inadmissible.

148. It is necessary to examine the positions of the Crown and defence with respect to the admissibility of Mr. Phillion's statements.

The positions taken by Crown and Defence on the statements made by Mr. Phillion on January 11 between noon and 8:21 p.m.

149. The Crown sought to lead the statements of Phillion that related to Mr. Roy's murder that were made on January 11 between noon and 3:45 p.m. During this time frame, Phillion gave his signed confession to Huneault and Nadori. The defence sought to exclude the statements in this time frame on the basis that they were involuntary. Van Camp J. ruled that the signed confession was voluntary but that the conversation Phillion had thereafter with Nadori at 3:45 p.m. was inadmissible.

Ruling of Trial Judge, *Voir Dire*, Vol. 3, 588/30 to 589/30

150. The Crown also led evidence on the *voir dire* of the two trips that Phillion made with the police to the crime scene. The Crown then conceded the likely involuntariness of this evidence during submissions. The trial judge ruled the statements were inadmissible.

Submissions of Crown Counsel, Vol. 3, 556/30 to 557/15
Ruling of Van Camp J., Vol. 3, 590/15 to 592/30

151. As a consequence, the jury heard no evidence of what Phillion said to Nadori at 3:45 p.m. or of the two visits to 275 Friel Street. Arguably, this evidence was important to demonstrate that

Phillion's confession was likely false because of his claims to Nadori that he had broken into an apartment and stolen a knife, and his inability to accurately re-enact the crime, especially on the first visit to the scene. As regards the second visit, there was substantial evidence from which the jury could have reasonably concluded that the police officers provided Phillion with helpful information to enable him to re-enact the crime with some degree of accuracy. Defence counsel, having failed in his attempt to exclude all the statements (an understandable endeavour since, if he had been successful, he would have eviscerated the Crown's case), might then have considered that, in light of Van Camp J.'s admission of his signed confession, it would assist Phillion if the jury heard of the two visits to the scene of the homicide. Presumably, despite the trial judge's ruling that the conversations during the visits were inadmissible, the defence could have led evidence of the two visits *if the Crown agreed* to the admission of the evidence. The Crown may have agreed to this, since he had unsuccessfully sought their admission into evidence in the first place. It is unknown whether Mr. Cogan, Phillion's counsel, knew the relevant law, considered the possibility of seeking the Crown's agreement to their admission and, if he did, what the Crown's response was.

*The positions taken by the Crown and Defence on the statements
made by Mr. Phillion after 8:21 p.m. on January 11*

152. The defence sought to lead into evidence all statements made by Mr. Phillion after 8:21 p.m. on January 11, including the contents of his telephone conversation from the cell area with his mother that night, his exculpatory statements to P.C.s Couture, Aldrich and Bayne, and his contradictory statement to Norton, on January 12. Mr. Cogan made the following submission:

“My Lady, it is my respectful submission that the verbal statements made by the accused to Constables Couture, Aldrich and Bayne do represent the whole of the surrounding circumstances in the case, in that if the written statement and subsequent statements be admissible in evidence that they too ought to be admitted to form the whole picture.”

The Crown responded as follows:

“I would like to address some very serious remarks to Your Ladyship on the point of the exculpatory statements made by the accused to four different police officers, the first ones being to Constable Couture and then to Detective-Sergeant Norton on January 12th and also on the 12th January to Constable Aldrich and to Constable Bayne. I indicated, My Lady, that I was calling that evidence on the voir dire in order for the Court to know the circumstances of the further conversations, but that I would not be tendering those statements in evidence unless Your Ladyship so ordered...”⁷²

He further said:

“My learned friend has indicated that, in fairness to the accused, I should put in all the statements made by the accused so that the jury can get the entire picture and let the jury decide as to what they believe and what they do not but, as I have said, My Lady, if I did that I would be putting evidence which is not admissible, self-serving evidence before the jury and it is a decision that I have to make and I have decided, subject to Your Ladyship’s ruling, not to put that evidence in. I have to consider, not only the fairness to the accused, but the interests of justice and in the interests of justice I feel in this particular case, in my discretion, I do not wish to tender those statements.”

Defence Submissions, *Voir Dire*, Vol. 3, 527/10-20

Crown Submissions, *Voir Dire*, Vol. 3, 557/40 to 558/10, 566/20-30

153. The trial judge ruled all the post 8:21 p.m. January 11th statements inadmissible but for what

Phillion had said to P.C. Couture at 10:28 p.m.. She found that the conversation with Couture:

“... was one continuous narrative in [Mr. Phillion’s] mind; that some part of what was said was in explanation of what he had previously said and that the statement to Constable Couture, I rule, is admissible.”

⁷² At one point in his submissions, the Crown excluded the conversation with Detective Sgt. Norton at 7:47 a.m. on January 12 from his submission that all post 8:21 p.m. statements should be excluded, but did not elaborate on what he meant by this. Later, after the trial judge made her ruling excluding all but one of the post 8:21 p.m. statements, the Crown sought clarification of it in the context of this conversation in a manner which suggested that he was seeking exclusion of Norton’s conversation with Phillion in the morning. See Crown’s Submissions, *Voir Dire*, Vol. 3, 563/20, 598/10

As regards the balance of the conversations with the other officers, including Norton, on January 12, she ruled as follows:

“However, I cannot find that the statements made the following morning are so connected in time that they can form part of a single narrative and they will not be admitted under the exception to the rule as to exculpatory statements.”

Van Camp J. also ruled that the conversation that Phillion had had with his mother in the evening of January 11, which was overheard by P.C. Couture on an extension phone, was inadmissible. She said:

“I regard the statement made to his mother as not made to a person in authority. While [Phillion] knew that an attendant was standing beside him, he did not know that the statement was being recorded and he did not make the statement to the attendant. He could not know that what was being said at the other end of the phone was being heard and I rule that the phone call to the mother does not form a part of the evidence that I am directing should be produced by the Crown.”⁷³

Ruling of Trial Judge, *Voir Dire*, Vol. 3, 592/20 to 595/10, 597/10-20

154. It is now proposed to go through each of the exculpatory statements *seriatim*.

(a) P.C. Couture’s Dealings with Romeo Phillion

155. The jury heard evidence that Mr. Phillion had asked P.C. Couture, who was monitoring him in the cells, for a newspaper to read at about 7:20 p.m. on January 11. The jury also heard that at

⁷³ Despite the way Van Camp J. worded this part of her ruling – that the Crown did not *have to* introduce the evidence of what Couture overheard of the conversation between Phillion and his mother – it seems reasonable to conclude that she intended also to rule that *the defence* could not introduce it in its case.

about 10:28 p.m. Phillion, when asked by Couture what he had to do with the murder, responded that he had had nothing to do with it, had confessed because he wanted Neil Miller to get the reward and “wanted to get even and send [the police] on a wild goose chase” (*supra*, paragraph 98).

156. P.C. Couture, who knew Phillion from before, had given more extensive evidence on the *voir dire*. As regards Phillion’s request for a newspaper at 7:20 p.m., Couture testified on the *voir dire* that he was reading a newspaper at the time of the request. He spoke to Detective Nadori who told him to deny Phillion’s request. In his undisclosed investigation report of the event, Couture related as follows:

“At 17:50 hrs., Phillion was turned over to me by Detective S. Nadori and placed in cell #1 by cell block man Cst. Amisson. I sat on a chair outside the cell and nothing was said ‘till approximately 1920 hrs., when he asked me if he could have the newspaper that he, (referring to Amisson) if he was finished with same. I informed him that I was to check with him, as a result I call Detective Nadori on local 49 and asked him if he could read today’s paper, and he said not now but later, Phillion was then given three magazines. At this time he said why not the paper, is there something about me in it? I told him that I didn’t know but that he could read it later. He was satisfied with my information.

1931 hrs., he asked me, are those detectives going to come back, I told him that I didn’t know. 1945 hrs., he asked Amisson if he could bring some tobacco to his friend in the other cell; was informed by Amisson that he had some.”

The friend to whom he wanted to give tobacco must have been Neil Miller who was still being held in the cells.

Evidence of Couture, *Voir Dire*, Vol. 2, 443/20-40, 452/10
Investigation report of Couture, Jan. 11/72, Record, Vol. 2, Tab 12

157. Mr. Phillion was removed and then returned to the cells later that night during which time he was taken to the scene of the homicide for the second time. At 10:20 p.m., Phillion was allowed to speak to his mother on the telephone. P.C. Couture, who was still the custodial officer, went to

a phone in another room and listened to the conversation, which was in French and English. He recorded the conversation as follows:

Phillion: I got charged with murder.

Mother: What; that didn't go by yet.

Phillion: Yes. They got me with the 1967 rap.

Mother: Oh, no.⁷⁴

Phillion: *I said anything so that Neil would collect the reward. Things are going to change in Court tomorrow. I was so fed up that I said anything. I will say the whole truth tomorrow and it should change everything. Neil should collect the money.*

Mother: Were they rough on you?

Phillion: No. Tomorrow I will say the whole truth.

Mother: Listen, they didn't talk about father?⁷⁵

Phillion: They started to talk about the 1967 murder and I said it was not me then said it was me, because I was tired. Listen to me on the news. Bye. (emphasis added)

After the telephone call ended, Phillion asked Couture:

Q. Will they have dropped the charge tomorrow? What is the maximum charge for attempt armed robbery? There is a fourteen thousand dollar reward for me on that.⁷⁶

⁷⁴ Romeo's mother knew of the 1967 police investigation of him for the murder. She was in New Liskeard on August 13, 1967 when he was arrested.

⁷⁵ A possible explanation for Mrs. Phillion's seeming *non-sequitur* was that "father" referred to Alphedge Couschesne, Mrs. Phillion's common-law spouse at the time, who had some involvement in concealing the shotgun from the taxi driver robbery.

⁷⁶ In his January 11 investigation report, P.C. Couture wrote:

"The conversation [on the telephone with his mother] kept on talking fast but it was simply repetition of what they had already said. Before he hung up he said "listen to me they will be talking over the news tonight at every half hour by now." At 22.28 hrs. he said to me "they will have to drop the charges tomorrow"."

Couture replied:

A. You are aware that everything you say I will take down and it can and will be used at your trial.

Phillion responded that he understood this, and asked Couture if the call to his mother had been taped. Couture told him that he had listened to it on an extension phone.

Evidence of Couture, *Voir Dire*, Vol. 2, 445/30 to 447/40

158. Sometime after his phone call with his mother, Couture asked Phillion about the murder and he denied having anything to do with it. They then talked about the man with whom Phillion's mother was living (Alphege Couchesne), and discussed the robbery of the taxi driver on January 6, 1972 for which Phillion had been originally arrested earlier that day. In the midst of the conversation, Couture asked him, "What did you have to do with the murder?" to which Phillion replied, "Nothing at all." Phillion told Couture that he had been "high" at the time of the robbery, that he had a gun on him and "as I got out of the car I must have taken the gun out and the driver thought that I was going to rob him". The gun, Phillion said, was a loaded .22 calibre that a friend had given him three weeks before. He had given the gun to Couchesne after the event, which Couchesne had then buried outside in the snow, called the police and told them where it was. At the end of the conversation about the robbery, Couture asked him again about the murder and Phillion explained why he had confessed to it, and included his remark that he wanted to get even with the police and send them on a wild goose chase (*supra* paragraph 98). Their conversation concluded at 11:05 p.m.

Evidence of Couture, *Voir Dire*, Vol. 2, 447/40 to 448/30
Investigation Report of Couture, Jan. 11/72, Record, Vol. 2, Tab 90, p. 2

(b) Mr. Phillion's Conversation with Detective Sgt. Norton
at 7:30 a.m. on January 12

159. The next morning, Detective Sgt. Norton's supervisor, Inspector Soucie, told Norton to ask Mr. Phillion about the knife used in the homicide. Phillion was moved to a room near the cells and Norton cautioned him. He then asked Phillion some questions:

Q. Do you remember what the knife looked like?

A. No.

Q. Any idea how long it was?

A. No.

Q. Where in that apartment did you get it?

A. Near the kitchen, I guess.

Q. Could you estimate its length? ⁷⁷

A. No.

Q. When you threw it away was the knife in the bundle of clothing?

A. I think it was separate.

Q. *Do you remember selling the car radio in Trenton?*

⁷⁷ A copy of Detective Sgt. Norton's original notes of this conversation was in the archives. Immediately before being asked by Norton to estimate the length of the knife, Norton noted that Phillion said "*I don't remember much of anything*". This was not in Norton's evidence and it is doubtful that Mr. Cogan ever saw Norton's notes.

A. When did you find that? I sent my lawyer to check that out.⁷⁸ My car broke down, I owed \$11.00 and I gave them the radio. Through the information from my lawyer I think I was in Trenton about the time the offence here was committed. (emphasis added)

Norton testified that he asked Phillion if he remembered selling the car radio in Trenton because “this was information that I had learned from the main file”.

Evidence of Norton, *Voir Dire*, Vol. 2, 430/1 to 434/40

160. Despite Phillion’s sudden claim that he had not murdered Mr. Roy, Norton did not follow up on this last response but, instead, ended the interview. Phillion was returned to the cells at 7:38 a.m.⁷⁹ Norton described Phillion as being polite and cooperative throughout the interview.

Evidence of Norton, *Voir Dire*, Vol. 2, 434/40 to 435/10, 436/25

(c) Mr. Phillion’s Conversation with P.C. Aldrich beginning at 7:47 a.m. on January 12

161. P.C. Aldrich was assigned to monitor Mr. Phillion when Norton returned him to the cells at 7:38 a.m. At 7:47 a.m., Phillion said to him:

⁷⁸ We have been unable to find out who Mr. Phillion’s lawyer was on the Ottawa break and enter charge upon which he was arrested by McCombie in New Liskeard, and which was subsequently withdrawn on September 14, 1967. Phillion himself does not remember. The Archives of Ontario have advised us that they would have no file on the case because the charge was withdrawn. It may be that Phillion never retained a lawyer on the case. Phillion himself did not appear in court on the date the charge was withdrawn (see McCombie’s investigation report of Sept. 15/67). It seems unlikely that any lawyer would have done what Phillion claimed to Norton. Phillion’s claim was probably nothing more than an attempt to project his own self-importance. (See also *infra* paragraph 170).

⁷⁹ For further discussion of this conversation, see *infra* paragraphs 217 to 223.

“I am a real nut to confess to a murder that I never even committed.”

At 7:50 a.m., Phillion said:

“I guess they figure they have things wrapped up, eh? I have three lawyers that can say I was in Montreal at the time of the murder.”

P.C. Aldrich did not respond to either statement. At 9:00 a.m., a duty counsel spoke to Phillion in the cells, and at 9:55 a.m. Phillion was taken into a courtroom and appeared before His Honour Judge Strike. He was then returned to the cell. At 10:20 a.m., Phillion said to Aldrich:

“I was three hundred miles away when that [murder] happened, I have three lawyers to prove it.”

Five minutes later, he said:

“If they call me in for a lineup, I will refuse until my lawyer says so.”

Evidence of Aldrich, *Voir Dire*, Vol. 2, 456/40 to 458/20
Aldrich’s Statement of Jan. 12/72, Record, Vol. 13, Tab 47

(d) Mr. Phillion’s Conversation with P.C. Bayne between
12:30 and 1:50 p.m. on January 12

162. P.C. Bayne relieved P.C. Aldrich during his lunch hour between 12:30 and 1:50 p.m., and monitored Phillion in his cell. In his testimony, Bayne related what Phillion told him during this period:

“The accused told me that he did this all in order for his friend, Neil Miller, age seventeen years who lived with the accused at 1440 Mayview Avenue, apartment 1001 to collect the reward money. ... The accused stated to me that he was very depressed when he gave this statement and this was the way to get even with the cops. The accused also stated to me that he had been on drugs at the time he was driving in the taxi.

The accused told me that he wanted to get publicity from the papers and the radio. The accused told me that he had lied to the cops.”

Phillion was eating his lunch as he spoke. Bayne did not ask Phillion any questions and simply responded by saying “yes” or “mm-hmm”.

Evidence of Bayne, *Voir Dire*, Vol. 2, 461/1-40
Investigation Report of Bayne, Jan. 12/72, Record, Vol. 2, Tab 95

(e) Mr. Phillion’s Conversation with P.C. Aldrich
at 3:00 p.m. on January 12

163. P.C. Aldrich relieved Bayne after his lunch at 1:50 p.m. and continued to monitor Phillion until 3:30 p.m. Between 2:15 and 2:55 p.m., his lawyer, Arthur Cogan, for the first time spoke to Phillion in his cell. After Mr. Cogan left, Phillion sat down and said to Aldrich:

“Will I be going for a lie detector test at the University of Ottawa?”

Aldrich replied:

“I don’t know”.

Evidence of Aldrich, *Voir Dire*, Vol. 2, 458/10-30
Aldrich’s Statement of Jan. 12/72, Record, Vol. 13, Tab 47

(f) Mr. Phillion’s Desire to Talk to the Police on January 13, 1972⁸⁰

164. On January 13, 1972, Nadori and Huneault travelled to Renfrew as a part of their

⁸⁰ Neither counsel at trial made any attempt to introduce this evidence.

investigation. On their return to Ottawa, they went and spoke to Mrs. Yvonne Phillion, Romeo's mother. She told them that she had spoken to her son at the jail that day and he wanted to speak to the police. The police recorded her telling them that Romeo

“... was highly emotional stating to his mother that he did not commit the crime, that he is presently stand (sic) accused of and that at the above time of the murder concerned he was with his girlfriend on (sic) Toronto. He also advised her that he had not been abused by the police at the time he was apprehended regarding this matter and that he did not know as to why he confessed to the offence.”

Investigation Report of Nadori, Jan. 13/72, Record, Vol. 2, Tab 99

165. The following morning, January 14, on the advice of the Crown, Huneault and Nadori spoke to Phillion's counsel, Arthur Cogan. They then allowed Mr. Cogan to speak to Phillion on the phone, and overheard Phillion say at one point:

“I want to tell them the truth, there is nothing else to say.”

After completing the call, Phillion told the police that he wanted to talk to them. As they were taking him to the office, Nadori was asked to take the telephone. Huneault waited nearby with Phillion, who asked:

“How is Neil?”

Huneault motioned for Phillion to be quiet. When Nadori finished the call, he told Huneault to return Phillion to his cell as Mr. Cogan had just told him that he wanted to be present during any further interview of his client.⁸¹

Investigation Report of Huneault, Jan. 14/72, Record, Vol. 2, Tab 101, p. 3

⁸¹ The police reports referred to herein, containing the information about Phillion's desire to talk to the police on January 13 and 17, 1972, would not have been disclosed to the defence. Obviously Mr. Cogan, as a participant in some of the exchanges, had some knowledge of the events.

166. On the morning of January 17, Mrs. Phillion again called the police and told them that Romeo wanted to speak to them at the Carleton County Jail. The police telephoned Mr. Cogan who attended the police station. After speaking to Huneault and Nadori, Mr. Cogan told them that he intended to instruct Romeo not to give any more statements to the police.

Investigation Report of Nadori, Jan. 17/72, Record, Vol. 2, Tab 103, pp. 2-3

3. EVIDENCE NOT HEARD BY THE JURY – MR. PHILLION’S STATEMENT TO DETECTIVE SGT. NORTON ON MARCH 10, 1972

167. On March 10, 1972, after the preliminary hearing had commenced, Detective Sgt. Norton was told that Mr. Phillion wanted to speak to an officer. Supt. Flannagan suggested that someone other than Huneault or Nadori should speak to him. Phillion was brought to the second floor of the police station and immediately said:

“I don’t want my lawyer to know about this.”

He was interviewed by Detectives Norton and Coburn. A three page typewritten statement was taken from Phillion at this time. In a report dated March 10, 1972, Norton summarized the statement as follows:

“On this date, I was informed by Sgt. Juneau of the Court Section that Romeo Phillion, now on trial for murder - non capital, wished to see an officer and make further statements.

As a result of that Detective Edward Coburn and the writer brought Phillion down from the cell block at approximately 9:10 a.m. this date. A statement was commenced at 0913 hrs. lasting until 1023 hrs. In this statement the accused Phillion claims that another person, whose name he would not give us, along with an accomplice were robbing apartments on Friel St. on the day in question, that is August 9, 1967 and that this person has admitted to him to murdering Mr. Roy. His admission was first made on the Sparks St. Mall in 1968 and again while the two were serving sentence in St. Vincent de Paul Pen. in 1969. When the statement was concluded I asked the accused if he would give me the names of these two

people who he claimed to know and he stated that he did not wish to give us the names, that this would all come out in the trial.

As a result of this, there is little we can do with regards to investigating these statements made by Phillion.”

The Crown made no attempt to lead the statement into evidence and, due to the two months that had passed since Mr. Phillion’s arrest, it was not admissible at the instance of the defence. Little or no credence can be given to its contents.

Evidence of Norton, Preliminary Hearing, Vol. 7, 8/1, 19/40, 28/40 to 31/20
 Evidence of Norton, Preliminary Hearing, Vol. 7, 29/1
 Investigation Report of Norton dated Mar. 10/72, Record, Vol. 2, Tab 114

168. The actual statement was filed as an exhibit on the preliminary hearing but its contents were not put on the record (due to Crown objections). In the statement, a copy of which was found in the archives, Phillion described to Norton and Coburn his reaction when McCombie first told him in New Liskeard on August 13, 1967 that he was charged with “housebreaking and theft” and “further charged with murder”.

“I was shocked to hear that. So right away I thought that something might have happened to Gail Brazeau, my girlfriend, and McCombie said it is not a she it is a he. I asked him the name. Then he says do you know a guy by the name of Leo Roy. I said no. So then I figured that it was a guy from prison that I did time with. So I was brought back to the cells in New Liskeard.”

He related that he was taken to Ottawa:

“There at the Detective bureau I opened my wallet and took a receipt out and told McCombie here is where I was at the time the murder happened. Then I was brought upstairs and I stayed in the cells over night and was charged with house breaking.”

The receipt of which Phillion spoke is discussed in the *Addendum to Part 3*. Mr. Cogan sought more information on the contents of the statement at the preliminary hearing. He asked Detective Norton:

Without going into the contents of the statement, would it be fair to say that the accused on March 10th indicated to you that he was elsewhere at the time.”

The Crown objected to the question as self-serving, whereupon Mr. Cogan withdrew it. As it happens, Norton and Coburn never did ask Phillion where he was at the time of the murder.

Evidence of Norton, Preliminary Hearing, Vol. 7, 31/20 to 33/40

169. Phillion’s claim in his March 10 statement that a man, whom he first met on the Exhibition Grounds but refused to identify, confessed the crime to him, lacks credibility. However, it is of interest to review some of the contents of the confession that Phillion claimed to have received from this man:

“He told me that he made three apartment buildings on August 9th, 1967. He and an accomplice both of them. He admitted to me about the murder in question and he said the old lady should have got it too. She caught him while he attempted to get into an apartment with a plastic card and his accomplice had run out of the building when he heard that lady yell for her husband and that is when he told me that he met with the man and knifed him. He told me what kind of a weapon it was. He said it was something that he opened doors with and then he left the building ran to Nelson and Rideau St. at a taxi stand and took a cab to an hotel and stayed there. That night he went to his accomplice’s home at Friel St. and Rideau. I did not want to hear any more as I had heard all I wanted to know.”⁸²

Statement of Romeo Phillion, Mar. 10/72, Record, Vol. 13, Tab 5

170. In his statement, Phillion further claimed:

“In 1970 I bought myself a new convertible, a new car, with the reward money from the Carp murder. I went to Toronto to get two lawyers and a reporter. The four of us went to every person that saw me on August 9th, 1967. We interviewed everybody. They told me that they would keep this on record if frame ups should occur. In 1971 I wanted to see the police but I was scared that they might spoil it.”

This is reminiscent of Phillion’s claim in the cell area to P.C. Aldrich on January 12, 1972 that he

⁸² Phillion referred to this man, without naming him, in an interview with Jack Parish of *Summit Investigation Services* on August 19, 1993.

had “three lawyers to say I was in Montreal at the time” of the murder. These claims seem to be highly unlikely.

Phillion’s Statement, Mar. 10/72, Record, Vol. 14, Tab 5

171. Phillion related to Norton and Coburn how he had gone to see the Ottawa Police Station on March 25, 1971 and told McCombie that his brother Donald was ready to confess to the murder (*infra* paragraph 251). He then continued:

“There I wanted to get myself charged with it in order to hear Mrs. Roy’s testimony but I decided to wait. January 10th 1972 I decide to go through with it. I made a false statement on it and I wanted the police to sort of believe me that I was the one. Now I want to go to court and hear the only witness say what really happened. What she said on that stand did not fit me but fitted the person in question. So I guess that is all.”

Evidence of Norton, Preliminary Hearing, Vol. 7, 31/20 to 33/40

Phillion’s Statement, Mar. 10/72, Record, Vol. 14, Tab 4

See paragraphs 146 and 251 *infra*

4. EVIDENCE EXCLUDED BY THE TRIAL JUDGE – THE EVIDENCE OF JOHN REID, THE POLYGRAPH EXAMINER

172. The Crown completed its case on Wednesday, November 1, 1972, whereupon the Court adjourned for the day at 2:50 p.m. That afternoon, Mr. Cogan tried to have John Reid, a polygraph examiner, admitted to the Detention Centre to conduct a polygraph examination of Mr. Phillion.⁸³

The Superintendent at the Detention Centre refused access to Mr. Reid on the grounds that this type

⁸³ The date of Mr. Reid’s first involvement in the case was not recorded in the evidence. In his evidence on the *voir dire*, Mr. Reid testified that he had first heard from the defence “some time ago”. It is worthy of note that on January 12, 1972, Mr. Phillion, himself, asked P.C. Aldrich who was monitoring him in his cell at the time, when he would be taking a lie detector test. He asked this question shortly after he first met with his defence counsel, Mr. Cogan (*supra*, paragraph 163).
Evidence of Reid, *Voir Dire*, Vol. 6, 1170/40

of examination had not previously been undertaken in the Detention Centre. The next day, November 2, 1972, Mr. Cogan advised the Court of what had happened:

“At approximately seven o’clock yesterday evening I attended at the jail, in any event with the professional witness – the professional witness, I might add, is also a lawyer, albeit not of this jurisdiction, but that need not matter. After properly signing in at the jail, I attempted to see my client with the professional witness and I was told by the deputy superintendent that his orders from the superintendent were that my client could see me, but he could not see the professional man for any reason, whether it be for an examination or simply for an interview.”

Mr. Cogan advised Van Camp J., in the absence of the Crown, of the nature of the examination to be conducted by Mr. Reid, and sought the Court’s assistance in having Mr. Reid see Mr. Phillion. Van Camp J. ordered that the examination be conducted that morning, and adjourned Court until 2:30 p.m. Mr. Reid then conducted a polygraph examination of Mr. Phillion.

Transcript, Vol. 5, 1054/10, 1055/20 to 1064/50

173. During the examination in chief of Dr. Arboleda, the Court embarked on a *voir dire* into the admissibility of Mr. Reid’s evidence and the results of the polygraph examination. Mr. Reid and Dr. Arboleda both testified on the *voir dire*.

Evidence of Dr. Arboleda, *Voir Dire*, Vol.5, 1088/25

174. Mr. Reid was at that time viewed as pre-eminent in his field. He had authored a definitive text on police interrogation methods. He had been a polygraph examiner for 32 years and was licenced as such in the State of Illinois. He was also a qualified Illinois attorney. He was trained as a polygrapher at the Chicago Police Scientific Crime Detection Laboratory, in association with Northwestern University. He had co-authored three books related to the field of polygraphy. He was past President of the American Academy of Polygraph Examiners, and a member of several

organizations including the American Academy of Forensic Sciences and the Illinois Association of Chiefs of Police. He was a regular instructor for prosecutors and defence counsel.

Evidence of Reid, *Voir Dire*, Vol. 6, 1153/30 to 1158/10

175. Mr. Reid had made contributions to the technique of administering a polygraph. He had conducted reliability studies of the polygraph. He had used his expertise as a polygrapher in the criminal field, in civil proceedings and in employment-related areas in which security was an important component of a particular employment. He had examined, or supervised the examination of, at least forty thousand subjects in his career.

Evidence of Reid, *Voir Dire*, Vol. 6, 1158/10 to 1162/30

176. Prior to the polygraph examination, Dr. Arboleda determined that Mr. Phillion was an appropriate subject for testing. It was Dr. Arboleda who requested Mr. Cogan arrange the polygraph examination as Dr. Arboleda was familiar with the discipline, and placed some reliability on polygraph results. He knew and accepted Mr. Reid's credentials as a polygraph operator.

Evidence of Dr. Arboleda, *Voir Dire*, Vol. 6, 1142/30 to 1145/50, 1151/20, 1153/20

177. Mr. Reid was briefed by Mr. Cogan on the background of the case against Mr. Phillion and was shown his typewritten confession. Mr. Cogan also briefed him on the findings of Dr. Arboleda and, presumably, Dr. Girodo. He was alone with Mr. Phillion while he conducted the tests which, themselves, took approximately thirty minutes. He told him that:

“...if he was telling the truth I would prove he was telling the truth, but if he was not telling the truth I would prove that to him too.”

The testing measured five different physiological functions of Mr. Phillion.

Evidence of Reid, *Voir Dire*, Vol. 6, 1170/20 to 1178/40

178. Mr. Reid explained the examination of Mr. Phillion in terms of the mechanics of examination. He found Mr. Phillion to be cooperative, and willing to take the test. He listed the questions asked of Mr. Phillion during his examination including five “relevant” questions which were:

- (1) On August 9th, 1967 did you wrestle with Leopold Roy at 275 Friel Street?
- (2) Did you stab Leopold Roy on August 9th, 1967?
- (3) On August 9th, 1967 were you trying to enter an apartment 275 Friel Street?
- (4) Did you kill Leopold Roy on August 9th, 1967?
- (5) On August 9th, 1967 did you meet Leopold Roy on a stairway at 275 Friel Street?

Mr. Reid was asked:

Q. Mr. Reid, on the basis of your experience and the recordings that you made of Mr. Phillion during the course of the polygraph test, did you form an opinion as to whether he was telling the truth when he answered no to the relevant questions?

A. I am of the opinion that he is telling the truth when he answered no to the relevant questions.

Evidence of Reid, *Voir Dire*, Vol. 6, 1162/30 to 1169/20

179. Mr. Reid acknowledged a possible error rate in polygraph results of one percent, although studies had revealed an error rate of only one tenth of a percent.

Evidence of Reid, *Voir Dire*, Vol. 6, 1169/30

180. In her ruling on the *voir dire*, Van Camp J. found that Mr. Phillion could not have been

examined by “a more skilled examiner” than Mr. Reid and was satisfied that he had conducted the polygraph examination with complete competence and professionalism. Nevertheless, she concluded that Mr. Reid’s evidence was inadmissible, but allowed Dr. Arboleda to tell the jury that the results of the polygraph testing were one of the bases of his opinions regarding Mr. Phillion’s personality and the likelihood that his confession was false. Van Camp J.’s ruling was subsequently upheld by the Ontario Court of Appeal and the Supreme Court of Canada.

Ruling of Van Camp J., *Voir Dire*, Vol. 6, 1221/30 to 1225/50

**5. EVIDENCE NOT HEARD BY THE JURY –
THE TAXI DRIVER ROBBERY ON JANUARY 6, 1972 WHICH
LED TO MR. PHILLION’S ARREST ON JANUARY 11, 1972;
AND NEIL MILLER’S TWO STATEMENTS TO THE POLICE**

181. Mr. Phillion’s relationship with Neil Miller was of extreme importance at his trial. Miller testified that Phillion had confessed Mr. Roy’s murder to him. The jury, however, did not hear a considerable body of evidence that would have helped them to understand the full picture of their relationship so as to enable them to ascribe appropriate weight to the Miller confession.

182. Mr. Phillion was originally arrested on January 11, 1972 on a charge of robbing a cab driver in Ottawa five days earlier. He pleaded guilty to this charge after his non-capital murder conviction and received a concurrent sentence of twelve years’ imprisonment. At the urging of the defence, all reference to the robbery was excluded at the trial.

See Submissions, Vol. 3, 599/30 to 602B/20

183. On the night of Thursday, January 6, 1972, Jaine Marulanda was driving his taxi in Ottawa. At about 7:00 p.m., he picked up two men, Romeo Phillion and one David Kellar. Kellar sat in the front, and Phillion sat in the back. They directed Mr. Marulanda to a shopping mall where one of them said he was looking for his wife. Marulanda was directed to stop at a beer store, and then directed to stop on Trenton Avenue. At this point, Phillion produced a gun and demanded that Marulanda give any money that he had to them. Marulanda resisted, shouted for help and the two men fled. Mr. Kellar was arrested at 8:45 p.m. that evening on the street, and was identified as one of the robbers by witnesses to the event.

Evidence of Marulanda, R. v. Phillion and Kellar preliminary hearing, July 5/72, 4/50 to 10/50
Evidence of P.C. Lehr, R. v. Phillion and Kellar preliminary hearing, Aug. 10/72, 134/40

184. Alphege Couchesne lived with Mr. Phillion's mother at 46 Nelson Street, Apartment 2. On January 9, 1972, Mr. Phillion came home with a brown shopping bag. He asked Couchesne to bury the shopping bag and its contents. Couchesne took the bag and threw it into the snow between 46 Nelson and the adjoining building. Neil Miller had also seen Phillion with the gun. On January 10, Detective Devine of the Ottawa Police Department seized the gun from a snowbank by 46 Nelson Street. It was loaded at the time.

Evidence of Couchesne, R. v. Phillion and Kellar preliminary hearing, 105/50 to 112/20
Evidence of Detective Devine, R. v. Phillion and Kellar preliminary hearing, 184/1 to 185/40
Evidence of Neil Miller, *Voir Dire*, Vol. 2, 337/10

185. Sometime after 10:00 p.m. on January 10, Huneault and Nadori went to 1440 Mayview Avenue, Apartment 1001 where they were looking for Romeo Phillion to arrest him for the robbery of Mr. Marulanda. They were told by the occupants that he had just left. According to the officers,

Neil Miller agreed to accompany the officers to the police station. According to Miller, the police “were standing there with revolvers saying, ‘Where is he, where is he?’ and [Romeo] was not in the apartment, so they took me down for questioning at the police station.” Once there, Miller gave them a statement in his handwriting regarding the robbery of Mr. Marulanda. His statement read as follows:

“[In the Case of] Romeo Phillion, I met Romeo 2 yrs. ago, we’re lovers, broke up last June because of him harming a friend of mine financially. Went home for month of July as he was threatening me. Came back to Ottawa in Aug, seen him on the street once in awhile. Met him again as friends at welfare in Nov. He wanted to become lovers again and I refused, because of the things which happened while with him.

So I first seen the gun at the old apt. on 31st of Dec. He pointed it at me and said he was going to kill me so no one else could have me. If he couldn’t he said no one would. So I was forced to stay in at all times and let no one no (sic) he had the gun. I suppose I talked my way out of being shot.

The gun I think is a 22 calibre sawed off rifle and repeater.

On the 2nd of Jan. moved in new apt. He left I think Mon 3rd Jan. or Tues. 4th Jan. around 3 p.m. and said he would leave me alone, just as long so I kept quiet about his threats. To my knowledge he returned to my apt. Wed. the 6th of Jan. around 3 a.m. with a guy by the name of Dave I think. They both left the same day together at around 5 p.m., with a brown sac which was empty. He said again he was leaving for good. The sac he said, he needed it for this pile of money he had buried in a snow bank, he also said on a roof, in a chimney and various other lies I’m sure. He said he held up a bank first then other different places. *He always was a man for making many stories and living in a world of fantasy. He liked to think he was a big man.* So anyway him and his friend were suppose to have taken a taxi from Toronto to Ottawa and paid the taxi driver a \$100.00. He also said Montreal, I read in the paper of a taxi being robbed out of a \$100.00 dollars. At first I thought it was him as he admitted to it but then denied it. So I hoped for his sake it wasn’t.

The day him and his friend left my place together he returned roughly around three hours later I think, being quite nervous. I thought it was another act for me to feel sorry for him and go back out with him again. I heard on the radio the next day of the other taxi and then was quite sure he was in this mess as he did have a gun, it happened twice in a row, in the same area. I was frightened of him after this last incident, so I left him have his own way at my home. He carried this gun in his pants loaded I’m sure. I’m sure he carried it constantly. I last seen him this evening just before I had my bath. The police arrived I believe during the time I was having a bath, I last see the gun on Sat. He said he sold it to his mother’s boyfriend. I myself didn’t believe it.

I hope for Romeo's sake he's caught and put in an institution for the criminally insane. I'm sure he needs a Psychiatrist bad. I still think he would be a good person if he had the proper help. The person whom I'm referring to is Mr. Romeo Phillion." (emphasis added)

Neil Miller was aware of another taxi robbery in Hull in which Phillion claimed he had been involved. Miller additionally told the police about a robbery that Phillion claimed to have committed at the Dorval Airport in Montreal, about bank hold-ups that Phillion claimed he had committed in Toronto (Miller did not know whether to believe these claims) and a number of other robberies.⁸⁴

Miller was taken back to his residence after the police had finished questioning him.⁸⁵

Evidence of Huneault, *Voir Dire*, Vol. 1, 143/10 to 147/5
 Evidence of Huneault, Preliminary Hearing, Vol. 5, 480/20, 418/1-50
 Evidence of Nadori, *Voir Dire*, Vol. 1, 246/30 to 249/40
 Evidence of Neil Miller, *Voir Dire*, Vol. 2, 337/30 to 339/40, 358/30 to 359/40
 Neil Miller's Jan. 10/72 statement, Record, Vol. 10, Tab 1

186. The following Tuesday, January 11 at 11:00 a.m., Detectives Huneault and Nadori went to 46 Nelson Street, Apartment 3, where Phillion's mother lived, in the hope that he might be there. They were allowed in by Mrs. Phillion and found Romeo sitting at the kitchen table drinking coffee. He told them that he had already called the station that morning to tell them that he was going to surrender. Nadori arrested him for attempted armed robbery.⁸⁶ On the way out of the apartment building, Nadori asked him, "Where did you get the gun?" Phillion replied, "I didn't; somebody bought it for me". Phillion told them that he had put the remains of the sawn-off barrel in the

⁸⁴ Phillion was never charged with any of these offences that he bragged to Miller he had committed. There is not enough information to know whether the robberies actually took place. It may be that some, or all of them, never occurred.

⁸⁵ Miller testified at the preliminary hearing into the robbery charge against Phillion and Kellar. See Preliminary Hearing transcript (robbery) 139/20 to 162/50

⁸⁶ The jury never heard that Phillion had been arrested for robbery on the morning of January 10.

garbage. The police looked for them but they were not there. On the drive to the police station, Phillion asked:

“Did you let Neil go?”⁸⁷

Nadori advised that they had.

Evidence of Nadori, *Voir Dire*, Vol. 1, 249/40 to 251/40
 Evidence of Nadori, R. v. Phillion and Keller, Preliminary Hearing, 174/10-40
 Evidence of Huneault, *Voir Dire*, Vol. 1, 147/10 to 149/5

187. On arrival at the station, Phillion was questioned by Huneault and Nadori in a room. Nadori told him about their investigation into the robbery, the evidence that they had acquired and the existence of witnesses who could identify him. He was told that the police had seized the gun. Huneault was unsure whether Miller’s name was mentioned. At 11:17 a.m., they commenced taking a typed statement from Phillion which finished at 12:04 p.m. This statement has not been located in the archives, and its contents were not elicited at the preliminary hearing into the robbery charge, or at any of the proceedings involving the murder charge. It is, however, apparent that the statement was, at least to some extent, incriminating to Phillion.

Evidence of Nadori, R. v. Phillion and Keller, Preliminary Hearing, 175/10 to 179/30
 Evidence of Huneault, R. v. Phillion and Keller, Preliminary Hearing, 159/10 to 162/40
 Evidence of Huneault, *Voir Dire*, Vol. 1, 149/1-40, Vol. 2 463/20 to 465/20
 Evidence of Nadori, *Voir Dire*, Vol. 1, 251/40 to 252/5

188. It was as Phillion was being taken to the cells, after he had given a statement on the robbery charge, that Huneault asked him if there was anything else that he wanted to tell them whereupon Phillion confessed to the murder.

⁸⁷ The police learned subsequently that Phillion had gone back to the Mayview building after Miller had returned there from the police station.
 Evidence of Huneault, Preliminary Hearing, Vol. 5, 480/20

189. The jury, however, did not know that Miller had first been questioned on January 10, 1972 by the police in connection with the cab driver robbery, and given them a statement (quoted in full paragraph 185 *supra*). Consequently, the jury never heard that Miller, the day before Phillion's claim to the police that he murdered Mr. Roy, had described to the police some of the boastful claims Phillion was making about other crimes that had probably never taken place. And just one day before Phillion's confession, Miller told the police:

“He always was a man for making up stories and living in a world of fantasy. He liked to think he was a big man.”

Neil Miller's Statement to Police, Jan. 10/72, Record, Vol. 10, Tab 1

190. Nor did the jury hear the contents of Neil Miller's statement to the police when he was brought to the police station the next day by Detectives Huneault and Nadori at Phillion's request after he had orally confessed to the murder. Miller commenced giving this statement at 1:40 p.m. According to Nadori,

“We asked him to tell us about their entire relationship right from the beginning, and if anything happened to be mentioned in connection with the murder.”

This second statement of Neil Miller took between thirty minutes and an hour to complete and read, in full, as follows:

“I first met Romeo Phillion at the end of September 1967, at Bolan's Guest House, 55 Murray Street, Ottawa. I started going steady with him at the beginning of October, 1969, and about the 1st. of November 1969 I moved in with him at 534 King Edward St. Ottawa and we lived together. I went home to Pembroke Ontario in December for Christmas in 1969, and while I was visiting my parents, and in my absence Romeo sold my T.V. and my Record Player. I returned the first week in January 1971, and had an argument with Romeo over these missing articles, as a result we separated for a short period of time, and at the end of January I returned to live with him on his insistence.

During the month of February I was physically assaulted by Romeo, because of an incident which occurred over in Hull with other male persons. He had thought I had cheated on him.

About a week after I had received this beating from Romeo, we were both at home, on King Edward Ave. and we both got drunk, at which time Romeo got the blues, was feeling sorry for beating me up, and he got very talkative, talking about his parents, and his life with them, and his present life because of his childhood with them. This time was about a week after the Mardi Gras, in 1970. At this time he asked me if I knew he had been charged with Murder several years ago, and that he had been put in jail for this charge. He indicated that this case was put off on several occasions and finally dismissed. At that time he denied that he had committed the Murder he spoke of.

Between February and June 1970 when we were still living together, I learned that he had taken radios and other small things, from friends of mine, one particular person, Chantal York, a male person, and as a result I moved in with David Latendresse, at 201 Hinchey, he found out where I was living, made all sorts of threats, and said if I didn't come back to him he would cripple me.

On a night at the end of June 197[1], he came over to Hinchey St. and forced the door because we wouldn't open it, and when he got in he approached me upstairs casually, attempted to talk me into going back to live with him, I refused, telling him he would not change, at this he removed a knife, a long slightly curved blade, bronze and silver in colour, with the shape of brass knuckles on the handle, and threatened that he would use this knife on me if I didn't go with him.

At that point we went into the bedroom he started to talk nice to me again, but I was frightened of him, but did not want to show it, so I stood up to him and argued with him, at this time he told me that the murder he had told me about before on King Edward St. he had done it, and told me this in a threatening manner. I ran to the kitchen, followed by Romeo, where he was calmed down by David Latendresse. Romeo was to come back to see me the next day however I left town to stay with my parents.

I came back from Pembroke in August 1970, only casually until the beginning of December 1971, did I see him.

In December 1971 I met him in the Welfare Office in Ottawa and since then I saw him more frequently both at my place and at his apartment at 46 Nelson Street.

About on the 7th of January 1972, we were lying down on the floor in the living room of my apartment on Mayview, we were talking about old times, and how things could have been good between us, and at this time he was talking about suicide, that he had nothing to live for and that he didn't care if the Police shot him down, he started to talk about this murder again, asked me if I remembered about it and I said "Yes", he started telling me how it happened, how he went into some apartment building, to steal some money, that there was supposed to be a lot of money hidden under a bed, that the Superintendent or the landlord, he believed had called the Police and that he had to get out of the building, that as he was rushing down the stairs, the Superintendent, a Fireman, was coming up, and that he plunged the knife into this guy, and then he rushed out to the car, a red soft top, then he drove to North Bay, and subsequently either came back to Ottawa or the Police picked him up. He said he used the knife on the man because he thought he could not get away otherwise, and

did not want to go back to jail. We both cried afterwards, and I told him I didn't believe it, but he said yes I believe its true.

After the time when he pulled the knife on me I was tempted to tell the Police but I was afraid of him.” (emphasis added)

It was this statement that Phillion read immediately before he gave his typed confession to the police at 3:10 p.m. on January 11, 1972.

Evidence of Huneault, *Voir Dire*, Vol. 1, 153/1 to 156/10

Evidence of Nadori, *Voir Dire*, Vol. 1, 259/5 to 260/40

Evidence of Nadori, Robbery Preliminary Hearing, Vol. 6, 573/10

Evidence of Neil Miller, *Voir Dire*, Vol. 2, 340/15 to 342/10

Neil Miller's Jan. 11/72 statement, Record, Vol. 10, Tab 2

191. Neil Miller's statements contained information which the jury needed to know to properly assess whether Phillion's confessions to Miller were likely truthful. A careful reading of them would have caused the jury to be extremely cautious in placing any credence on them.

- At first, in February, 1971, Phillion raised the issue of the murder with Neil Miller at a time he was apparently feeling sorry for himself, exaggerated the extent to which he had been implicated in it by, for example, claiming that he had been charged with it and spent some time in jail as a consequence, but denied that he committed it.
- In June, 1971, Phillion was trying to scare Miller into living with him again. He pulled a knife on Miller and told him that he had committed the murder “and was not afraid to do it again.”
- On January 7, 1972, Phillion was depressed and talking about suicide because “things had never been good between them”. He then described the murder to Miller in some detail (much of it inaccurate). They both cried after his confession.

Phillion's psychological profile provides a ready explanation for his "confessions" to Neil Miller other than a conclusion that he was confessing to a murder he actually committed (see Part 5 *infra*).

192. Miller elaborated on Phillion's confessions to the murder in his evidence on the *voir dire*. He testified that on three different occasions in 1970 and 1971, Phillion told him that "he did" and then "he didn't" commit the murder. Miller described this as typical of Phillion's "general nature for as long as I have known him". Phillion, Miller said, was "constantly jealous" and was often trying to frighten Miller to come back to him. He further testified that Phillion told him on January 1 and January 7, 1972 that he had committed the murder. He added that Phillion "constantly lies".

He was asked:

Q. And when he talked about the murder and he admitted it on occasion you told him you did not believe him either. Isn't that true?

A. No, I didn't believe him.

Q. In fact, in the room when you were with the detectives did you not tell Romeo in the presence of the policemen, "Romeo, I don't believe you did this."

A. Could you repeat that again?

Q. In the presence of the two detectives and the accused in the room where you met him - -

A. Yes. I did say, "I don't believe it."

Evidence of Neil Miller, *Voir Dire*, Vol. 2, 339/40, 347/5 to 352/20, 366/20-30

193. When the police returned from 275 Friel Street after their first visit there with Mr. Phillion, Nadori questioned Phillion further between 4:52 and 5:00 p.m. about the robbery. There has been no disclosure of this conversation, except that Nadori was asked in cross-examination during the preliminary hearing into the robbery charge what questions he asked of Phillion about the robbery

at that time. Nadori was instructed by defence counsel not to elicit Phillion's answers (likely because the Crown would have objected) but did say that at one point Phillion said, "I should have shot him".

Evidence of Nadori, R. v. Phillion and Keller, Preliminary Hearing, 179/30 to 182/20
Evidence of Nadori, Preliminary Hearing, Vol. 6, 561/40

PART 4**THE UNDISCLOSED EVIDENCE*****INTRODUCTION***

194. In this Part, the evidence is set out which has come into our possession which was not disclosed to counsel in preparation for Mr. Phillion's trial. The undisclosed evidence forms a vital component of this application and, when combined with the evidence that the trial judge ruled inadmissible, proves that Mr. Phillion's confession to Mr. Roy's murder was false. Consideration has been given to whether Mr. Phillion's counsel had access to this material in 1972. The 1972 disclosure regime in Ontario (and in Ottawa, in particular) did not contemplate disclosure of police reports, the documents in which the bulk of the undisclosed evidence is to be found. In addition, close scrutiny of defence counsel's conduct at Mr. Phillion's trial establishes that his counsel lacked the undisclosed information because, if he had had it, he would have used it to mount a comprehensive attack on the Crown's case. In fact, the information was so powerful that it could have been used by the defence in an attempt to terminate the prosecution before it proceeded to trial.

195. Jack Parish of *Summit Investigation Services* interviewed Mr. Cogan on April 11, 1995, several years before the police investigation reports first surfaced. He reported as follows:

"First, I informed Mr. Cogan of the fact that Mr. Phillion states that he, Cogan, was aware, in 1972 at the time of trial, of certain exculpatory evidence which was "in the police file" at the time of his first arrest, in 1967. I stated that it was not entirely clear what the nature of this evidence was, but that it appeared to be a reference to the "alibi" evidence concerning

New Liskeard, i.e. the traffic tickets, his brother Donald.⁸⁸

Mr. Cogan stated that he knew of no exculpatory evidence in the police file, or anywhere else which he failed to lead at trial. He stated that he had gone to great lengths to lead evidence favourable to the accused, even going so far as to enlist the services of Dr. Reed from Chicago, whom Mr. Cogan referred to as the “inventor” of the polygraph. It would have been totally incongruous for him then to suppress exculpatory evidence. Mr. Cogan stated that he is known by his colleagues as a vigorous and determined defence counsel and invited departmental counsel to ask members of the local bar to confirm this.” (emphasis added)

It is submitted that Mr. Cogan’s own summary of his performance in representing Romeo Phillion is not open to serious challenge.

Parish interviews Cogan, Apr. 11/95, Record, Vol. 15, Tab 12

196. Due to the importance of the undisclosed evidence, an analysis of the prevailing law at the time, combined with information that can be gleaned from the record of Phillion’s proceedings regarding what was, and was not, disclosed has been prepared and is set out in Appendix 1. It provides a comprehensive analysis of what was, and was not, disclosed to Mr. Phillion’s defence. In summary, the following conclusions are drawn:

Types of documents disclosed

- willsayers of witnesses who testified
- most of Phillion’s statements to the police
- the autopsy report

⁸⁸ Romeo Phillion’s belief that he was in New Liskeard at the time of the murder is discussed *infra* at paragraph 205.

Types of documents not disclosed

- police investigation reports
- most original statements of witnesses
- willsays of witnesses who did not testify

Disclosure issues are reviewed in the Memorandum itself insofar as they relate to particular undisclosed items that are discussed herein.

197. Mr. Roy was murdered at 275 Friel Street in Ottawa at 2:45 p.m. on Wednesday, August 9, 1967. On August 8, 1972, the Crown, Mac Lindsay, wrote a report to Jack Nadelle, a Crown, that Mr. Lindsay intended to be passed to Fraser J., who was then expected to be the trial judge, in which he advised that:

“... the defence in this matter appears to be one of alibi.”

In anticipation of this defence, and in order to rebut it, the Crown called Mrs. Barbe at trial who testified that Mr. Phillion was in Ottawa on the evening of the homicide, talking to her husband in the neighbourhood. During her evidence, Mr. Cogan conceded to the Court that Mr. Phillion was in Ottawa that evening (*supra*, paragraph 81) which amounted to an abandonment of any possible alibi defence. The Crown later called Mrs. Marie Brazeau whose evidence supported that of Mrs. Barbe in that Mrs. Brazeau also remembered seeing Mr. Phillion and Mrs. Barbe's husband talking outside at 10:00 p.m. one evening. The Crown further relied on Phillion's confession to Mr. Roy's murder made to Huneault and Nadori. At the end of his confession, Phillion said that, after dumping his clothing and the knife into the river, he drove that night to Trenton, and then to Toronto and New Liskeard. The Crown buttressed this evidence by eliciting from Ms. Barbe that she overheard

Phillion on the Wednesday evening telling her husband that he planned to leave Ottawa and drive to New Liskeard. In explaining the relevance of this part of the conversation, Mr. Lindsay had the following exchange with the Court:

Her Ladyship: I am not sure in my mind what the probative value is on this charge as to the fact that he was going to New Liskeard and went to New Liskeard. I am a little bit uncertain how that is relevant..

Mr. Lindsay: It is just, My Lady, that you will recall the confession – supporting evidence going to the confession.

Her Ladyship: Now again, may I follow because I am having difficulty. Are you referring to Miller's statement?

Mr. Lindsay: No, My Lady, the accused's confession, in which he indicated – my recollection of it is that he left town that night and went by way of Trenton, I believe, through North Bay and home to New Liskeard.

Her Ladyship: I see what you are saying. In other words, this is supporting evidence for the fact in his statement where he said that he went to New Liskeard.

Mr. Lindsay: That's right, to support his narrative.

The Crown further proved through P.C. Bolger of the New Liskeard Police Department that Mr. Phillion was in New Liskeard in the early morning of August 11. If he had murdered Mr. Roy, he could, no doubt, have left town as late as the early evening of Thursday, August 10, and reached New Liskeard by the morning of Friday, August 11.

Lindsay's reporting letter to Fraser J., Aug. 8/72, Record, Vol. 14, Tab 28
Submissions during Mrs. Barbe's evidence, Vol. 5, 939/1-30

198. Mr. Cogan made no attempt in his client's defence at his trial to suggest he could not have committed the murder because he was not in Ottawa when it occurred.⁸⁹ In fact, Mr. Cogan

⁸⁹ This was despite the fact that Mr. Cogan had suggested on several occasions during the preliminary hearing that his client's defence would be one of alibi.

conceded that he was. He did know that Phillion had suggested on at least one occasion, to Detective Sgt. Norton on January 12 at 7:30 a.m., that he could have been in the Trenton area on the day of the homicide. What the defence did not know was that in 1967 Detective McCombie had verified that Phillion was, in fact, in Trenton on August 9 and had accordingly excluded him as a suspect. McCombie recorded this in the police report he wrote on April 12, 1968 at 8:00 p.m.. There is reason to believe that McCombie had acquired this information from Phillion when he was arrested in New Liskeard on August 13, 1967. Other features of the police investigation which would have enabled the defence to prove that Phillion was not in Ottawa in the afternoon or evening of August 9 were also not disclosed. These include the following:

- it is now known that Mr. Phillion received a ticket on August 8, 1967 for a traffic violation. Knowledge of this ticket would have helped Mr. Cogan establish Mr. Phillion's confusion as to his whereabouts on August 9, and also would have helped to establish his actual whereabouts on that day;
- the Barbes' undisclosed statements to the police in 1967, the undisclosed evidence of Paul Loyer, and aspects of the evidence at trial of Mrs. Barbe, establish that they saw Mr. Phillion the night *before* the murder not, as Mrs. Barbe testified at Phillion's trial, on the night of the murder;
- the undisclosed original statements of the Brazeaus further demonstrate that Mr. Phillion left Ottawa late at night on August 8, or early in the morning of August 9, and did not return.

1. **UNDISCLOSED INFORMATION IN THE POSSESSION OF THE POLICE THAT PROVED MR. PHILLION WAS IN TRENTON, LESS THAN TWO HOURS BEFORE MR. ROY'S MURDER**

Introduction

- (a) Information Known to Mr. Cogan at Mr. Phillion's Trial that Intimated that Mr. Phillion might not have been in Ottawa at the Time of the Murder

199. Mr. Cogan knew that his client had related on four occasions to the police that he was not in Ottawa at the time of Mr. Roy's murder.

- (i) When Detective McCombie questioned Phillion on August 13, 1967 as to his whereabouts on August 9, 1967, Phillion denied being at the scene of the murder. This was the only information that Mr. Cogan could get of the conversation. McCombie's memory, and defence counsel's knowledge, of the contents of this conversation was hampered by McCombie's loss of his notes by 1972. McCombie, it seems, chose not to resort to his investigation reports to help his memory.
- (ii) Phillion told Detective Norton on January 12, 1972 at 7:30 a.m. that he believed he might have been in Trenton at the time of the murder. On the other hand, in his typed confession, Phillion had told Huneault and Nadori that he had driven to Trenton after the murder.
- (iii) Phillion told P.C. Aldrich on January 12 at 7:47 a.m. that he was in Montreal at the time of the murder. Later that morning, he told Aldrich he had been 300 miles away at the time.
- (iv) On March 10, 1972, Phillion told Detectives Norton and Coburn that he had told McCombie in 1967 where he was at the time of the murder (but neither of the 1972 detectives asked him where this was).

(i) ***Mr. Cogan had limited knowledge of Mr. Phillion's statement to Detective McCombie on August 13, 1967***

200. Presumably as a result of Mrs. Roy selecting, in some manner, photographs of Romeo Phillion, and his twin brother, Donald, on August 10, 1967, Detectives McCombie and Coburn drove to New Liskeard on August 12 to find the brothers. They knew Romeo was in New Liskeard because, on August 12, Gail Brazeau gave McCombie a letter that she had received from him in which he told her he was in New Liskeard. He was living with his brother Donald in a rooming house on Wellington Street, New Liskeard, just behind the police station. The detectives were in possession of a warrant for Romeo's arrest for the unrelated housebreaking charge.⁹⁰ Information in the police investigation reports about this offence was that the house of one Dorothy Bird of 179 Laurier Avenue East in Ottawa had been broken into. On January 17, 1972, Detective Nadori reviewed the police report of the break and enter (which was not in the archives), and wrote in his own report:

“In relation to 1967 occurrence 26958, same involving the Bank of Montreal at 70 Rideau Street, phone: 566-3385, along with a stolen Government of Canada cheque in the amount of \$190.48, allegedly stolen from Mrs. Dorothy Bird, of 179 Laurier Ave., East, the writer has been in conversation with Mrs. Armstrong of the above bank for the purpose of determining as to on what day the cheque concerned had been uttered, as it is not mentioned in the initial report.

The significance of the above forged cheque is that at the time of the investigation relating to it, the complainant Mrs. Dorothy Bird, voiced an opinion that she thought that Romeo Phillion and his girlfriend Gail may have been the persons who stole and uttered the cheque.

As a result of preliminary checks by Mr. Armstrong at the Bank, it is revealed that the cheque in question had apparently been cashed on June 29, 1967.”

Investigation report of Nadori, Jan. 17/72, Record, Vol. 2, Tab 104, p. 2

⁹⁰ The jury did not hear that Mr. Phillion was arrested in New Liskeard for a housebreaking charge. This charge was subsequently withdrawn on September 14, 1967.

201. There is confusion in reports from the New Liskeard Police Department as to when Phillion was first seen by a member of their force in New Liskeard. P.C. Bolger testified at Phillion's trial that sometime after midnight on Friday, August 11, 1967, he saw Phillion's 1958 Ford convertible parked half a block from the police station. Phillion was sleeping in the car. Bolger woke him up and Phillion told him that he was "waiting until the morning because he didn't know where his brother, Donald, lived in New Liskeard". Bolger left him in the car. At 8:50 p.m. on August 11, 1967, Phillion was stopped in New Liskeard by P.C. Shortt who issued him a ticket for operating an unsafe vehicle and an uninsured vehicle. Bolger's timing is bolstered by Detective Nadori's January 25, 1972 investigation report wherein he advised that on January 24 he spoke to Donald Phillion. Donald told him that Romeo arrived in New Liskeard on the same day that he was later ticketed by P.C. Shortt.

Evidence of P.C. Bolger, Vol. 5, 950/20 to 951/20
 Willsay of P.C. Shortt, Crown Brief, Record, Vol. 13, Tab 40
 New Liskeard Police Department report, Aug. 11/67, Record, Vol. 2, Tab 102
 Investigation report of Nadori, Jan. 25/72, Record. Vol. 2, Tab 109

202. However, in his report of January 17, 1972, prepared at the request of the Ottawa police, P.C. Brown of the New Liskeard Police wrote:

"At this time it was our understanding that Phillion had arrived in New Liskeard *during the early morning hours of Thursday, August 10th*, 1967 and was staying with his brother Donald Phillion at 48 Wellington Street,⁹¹ New Liskeard." (emphasis added)

Investigation report of Brown, Jan. 17/92, Record, Vol. 2, Tab 102

⁹¹ Wellington Street may, in fact, have been a misprint for William Street.
 See Investigation Report of McCombie, Aug. 13/67, Record, Vol 2, Tab 26

203. In his January 19, 1972 investigation report, Nadori reiterated Brown's information in this regard and added that:

“The contents of these paragraphs as to the date in question has not been verified as yet.”

There is nothing else in the police reports to explain this contradiction. However, the letter that Phillion wrote to Gail Brazeau from New Liskeard on August 11 (see paragraph 250 *infra*) supports the view that he arrived in New Liskeard on August 10, not August 11, because he wrote in the letter “today at the garage, I fixed my car and it starts well now”, the implication being that he had arrived in New Liskeard on an earlier day.⁹²

Investigation Report of Nadori, Jan. 19/72, Record, Vol. 2, Tab 106

204. At the request of Detective McCombie, the New Liskeard police again located and this time arrested Romeo early in the morning on August 13. At about 8:00 a.m., McCombie and Coburn took him into their custody in New Liskeard. McCombie recounted in his investigation report of August 13, 1967 (which would not, as such, have been disclosed to the defence):

“At approx. 8:00 am we interviewed Phillion in regards to the warrant on the house breaking and he denied any knowledge and [at] the same time he was warned and told of our invst. regarding the murder and at that time denied any knowledge of this offence and stated that he was in New Liskeard at the time of the commission of the offence.”

In the same report, McCombie advised that they went to the Phillion residence and searched it, but found nothing of interest. His report continued:

⁹² Donald Phillion was interviewed in the penitentiary on January 24, 1972 by the investigators. Nadori recorded him as telling them that he first saw Romeo on the morning of the day he was ticketed (by P.C. Shortt on August 11 at 8:50 p.m.). Romeo was asleep in his car in front of Donald's house. He looked worn out and needed a shave. Donald told him to go in, have a bath and go to bed.
Investigation report of Nadori, Jan. 25/72, Record, Vol. 2, Tab 109

“We then had a conversation with his mother and brother Donald Phillion who stated that he had arrived in New Liskeard with only the clothes he had on his back which had consisted of a black pair of pants and a black short sleeved jersey. *At first both his mother and brother stated that it was Monday or Tuesday that he had arrived in New Liskeard and then after questioning them it was determined that he had arrived in New Liskeard some time on the morning of Feb. 4/67.*”⁹³

Investigation Report of McCombie, Aug. 13/67, Record, Vol. 2, Tab 26

205. This report of McCombie’s, in which Phillion first claimed to have been in New Liskeard at the time of Mr. Roy’s murder, was likely the seed for a procession of claims by Phillion over the next 30 years that he was in New Liskeard at the time. It is obviously regrettable that there is no record of the conversation between McCombie and Phillion that may have led to the latter’s belief thereafter that he was in New Liskeard at the relevant time. Was McCombie crystal clear as to what day of the week, what date, and what time the homicide occurred as he spoke to Phillion? Did Phillion fully comprehend whatever McCombie told him? Did McCombie carefully take him through each day from August 9 (or before) to August 13 the day of their conversation to ensure that Phillion was giving the issues his full consideration? In this context, it is important to note that Mrs. Phillion and Donald Phillion at first both thought that Romeo had arrived in New Liskeard on the Monday (August 7) or the Tuesday (August 8), and only “after questioning” was it determined that he arrived on “Feb. 4/67.” Was their confusion a reflection of the way in which McCombie’s questions were framed? And, if so, could Romeo have experienced the same confusion in response to similar questions? It may well be that in this interview, the only record of which appears in cryptic form in McCombie’s August 13, 1967 report, McCombie laid the seeds of confusion for

⁹³ The date of February 4th, 1967 as it appears in McCombie’s report is incomprehensible. Presumably, it was a misprint. Neither the month, February, nor the date, the 4th, make any sense in the context.

Romeo as to where he was on August 9 that have only now been exposed as a result of the discovery of McCombie's April 12, 1968 report. Did he describe to McCombie his journey from Ottawa to New Liskeard including his breakdown outside Trenton? Was this the catalyst for McCombie to check out the service station in Trenton? Common sense suggests that it was. McCombie would not have necessarily made a mention of this in his August 13 report if Phillion was telling him that he was in New Liskeard on the day of the murder because the significance of the Trenton breakdown may only have become apparent to him when he spoke to the service station operator and realized from him/her that Phillion was, in fact, in Trenton at the time of the murder.

Investigation Report of McCombie, Aug. 13/67, Record, Vol. 2, Tab 26

206. McCombie further reported on August 13 that he spoke to Donald Phillion and satisfied himself that Donald had been at work at Connelly Motors in New Liskeard on the day of the homicide, and that "a photostat copy of [his] time card will be found attached to the main file." A copy of his time card, which is largely illegible, was found in the archives.

Evidence of McCombie, Preliminary Hearing, Vol. 4, 381/15 to 382/1
Investigation Report of McCombie, Aug. 13/67, Record, Vol. 2, Tab 26
McCombie's Willsay, Crown Brief, Record, Vol. 13, Tab 12
Copy of Donald Phillion's time card, Record, Vol. 14, Tab 12

207. At the preliminary hearing, Mr. Cogan sought to question McCombie about his conversation with Phillion in New Liskeard. This led to the following exchange:

Q. And then how did you get to the murder [after you cautioned him on the house-breaking charge]? Tell me the sequence.

Mr. Lindsay: Your Honour, before we get much further with this, I hope my learned friend is not going to go into any statements or conversations with the accused. Because if he is, I am going to object. The Crown has not introduced any statements at this stage, and my position is that my learned friend cannot go into them. I just want to make my position clear on that before we go much further.

Mr. Cogan: Your Honour, I intend to go only into the circumstances, not into the statements themselves.

The Court: Very well.

Mr. Cogan: How did you get into the conversation about the murder?

A. After the warning and the answers given with reference to the warrant we were in possession of, he was informed of the nature of our investigation with reference to the murder.

Q. Just what was said by yourself? I do not want what the accused said, but how was he informed of the nature of the investigation?

A. I don't recall my exact words.

Q. Did you make notes at the time?

A. I don't recall whether I had notes on that or not. I told him that I was investigating the murder of Leopold Roy on August 9th, in an apartment building at 275 Friel Street.

Q. And the nature of how the man was murdered, was that not gone into?

A. I don't recall.

Q. Was it possible that it was mentioned?

A. Yes, it is possible.

Q. After you told him that, were questions put to him concerning the murder?

A. No, not concerning the murder but concerning his whereabouts.

Q. And you obtained certain information, did you?

A. Yes. (emphasis added)

Mr. Cogan then asked McCombie whether Phillion had given him a receipt at any time during their encounters in New Liskeard and Ottawa between August 13 and 15, 1967 (*see Addendum to Part 3*).

McCombie replied that he had not. Mr. Cogan then asked him:

Q. Is that the extent of the conversation after you went [over] his whereabouts?

A. Yes.

208. Mr. Cogan asked more about this conversation later in his cross-examination:

Q. When you had the conversation with Mr. Phillion, going into the substance of the conversation, I suggest to you that he indicated he was elsewhere at the time?

Mr. Cogan: Before my learned friend objects, it is the responsibility of the Defence to bring out an alibi at the first reasonable possibility. If my learned friend prevents me from doing this now, I want it on the record for the trial he cannot say that the accused did not bring up the alibi at the first reasonable opportunity. He cannot have it both ways. I say that before he makes his objection.

The Court: Very well. Mr. Lindsay?

Mr. Lindsay: Your Honour, the rule about bringing up an alibi at the first reasonable opportunity, to my understanding of the law, is that you do not bring it out in the Crown's case. It is a matter for the Defence to bring it out. My learned friend has put me in the position that I have to reply in this way. The fact that I object to any statements being put in which were not tendered by the Crown does not deny my friend the opportunity of calling an alibi at the first reasonable opportunity. There is more than one way of calling an alibi, and in my submission this is not the right way to do so.

Mr. Cogan: Then all I can say is that I will call Detective McCombie after the Crown closes its case.

The Court: Yes, you have the right to call Detective McCombie as your witness; that would be proper [for an] alibi if you wish to do it in that way.

Mr. Cogan: I am not familiar with the law that my friend quoted, that it does not come out during the Crown's case but I will accept that that is the law although I am not aware of it.

The Court: The rules as to alibi are, as you say, are difficult, but you do have that course. You can call Detective McCombie at any stage as your witness if you wish. I will allow the objection.

The Court: Detective McCombie, there is one thing I want to understand before we get involved in all of this. At some point you had some conversation with the accused. Was it part of the conversation in New Liskeard? I am not interested in the alibi now; Mr. Cogan has indicated that he will call you as his witness as to the conversation, so I am not interested in the conversation. But is the conversation that you referred to the conversation in New Liskeard?

A. Yes, sir.

In the event, Mr. Cogan did not call Detective McCombie as his witness after the Crown had closed its case. Detective Coburn, his partner, did not testify in any of the proceedings related to the

homicide. His willsay in the Crown brief is of no assistance. It simply advises that he “will corroborate the evidence of Detective John McCombie”.

Evidence of McCombie, Preliminary Hearing, Vol. 4, 389/35 to 390/30
Willsay of Coburn, Record, Vol. 13, Tab 14

209. McCombie was asked if he and Phillion had any discussion about the case on the drive to Ottawa. He responded that “There could have been”, and that if anything relevant had been said, he would have recorded it in his missing notes. The Crown also elicited from McCombie at the preliminary hearing that he had conversation with Phillion in the cell block at the Ottawa Police station before Mrs. Roy viewed the line-up.⁹⁴ McCombie testified:

A. Prior to this line-up being held the accused person was informed of the nature of our investigation while we were still at New Liskeard. Other than the warrant that we had on another charge, when we arrived back in Ottawa I spoke with him in the cell block.

Q. Do not go into any conversations you had.

A. No. As a result, hair was obtained from the accused.

Evidence of McCombie, Preliminary Hearing, Vol. 4, 345/20-30, 391/40 to 393/10

210. It must be that at some point in time, whether in New Liskeard, *en route* to Ottawa, or after their arrival in Ottawa, Mr. Phillion told Detectives McCombie and Coburn that while he was driving from Ottawa to New Liskeard, via Toronto, his car broke down somewhere near Trenton.⁹⁵ This is the only reasonable explanation for McCombie’s verification of his story with the Trenton service

⁹⁴ Phillion was booked in the Ottawa Police Station at 9:50 p.m. on August 13 on the housebreaking charge.
Investigation Report of McCombie, Aug. 13/67, Record, Vol. 2, Tab 26

⁹⁵ He may also have produced some kind of receipt from the service station (see *Addendum to Part 3*).

station, and a reasonable explanation for the New Liskeard Police's knowledge of the same story (*infra*, paragraph 245). It may also be that, at some point, Phillion in confusion over the day of the week, or the date, told McCombie that he thought he was in New Liskeard at the time of the homicide.

211. P.C. Huneault was to demonstrate some concern at the paucity of information regarding McCombie and Coburn's interview of Phillion in New Liskeard. In his January 13, 1972, investigation report, as a part of his "to do" list, Huneault wrote:

"I have a consultation with Lt. McCombie, and Detective Coburn, of this department, relating to their initial conversation with Phillion in New Liskeard on August the 13, 08:00 hrs., 1967."

No further mention is made of this consultation, or its results, in the subsequent investigation reports.

Investigation Report of Huneault, Jan. 13/72, Record, Vol. 2, Tab 98, p. 4

Detective McCombie's loss of his notes, and of part of his file

212. Whether McCombie recorded his conversation with Phillion on August 13 other than in his investigation report of that date is unknown. If he recorded it in more detail in his notes, they would not have been available because they had been lost. McCombie, who was the officer in charge of investigating Mr. Roy's homicide until he was promoted on January 1, 1972 (less than two weeks

before Phillion confessed), testified that he was away on a course on the day that Phillion confessed.⁹⁶

He had kept his working file in a desk in the detective office. When he returned from his course, he discovered several items missing from his file:

- he had made his notes on the case in a loose-leaf book, and had clipped them to his file. These notes had gone missing. He could not say when this had occurred, only that it could have happened as long as two or three years earlier,
- the ten photographs, which included photographs of Romeo and Donald Phillion, which had been shown to Mrs. Roy on August 10, 1967 had been lost since Phillion's arrest in January, 1972,
- at one point in his testimony at trial, McCombie said "just parts [of his working file]" had been lost. It is unclear whether he meant by this that there was more missing from the file than his notes and the ten photographs.

The "main file", on the other hand, which was kept in the general office was, apparently, complete. Detective Sgt. Norton testified that the working file was kept by the officer in charge in his personal possession. According to Detective Sgt. Norton, the main file, which should have contained everything in the working file (but apparently it did not contain copies of documents missing from McCombie's working file), was accessible to all detectives. Detectives Huneault, Nadori and Norton

⁹⁶ McComie had not gone far. Huneault stated in his January 13, 1972 report that the course McCombie was taking was at the Canadian Police College in Ottawa. Norton reported on that he had a conference with McCombie between the two trips to the scene on January 11. Nadori remembered that he "saw" McCombie at the police station on the evening of January 11, 1972.

Evidence of Nadori, Preliminary Hearing, Vol. 6, 599/30

Investigation Report of Huneault, Jan. 13/72, Record, Vol. 2, Tab 98

Investigation Report of Norton, Jan. 12/72, Record, Vol. 2, Tab 97

reviewed the “main file” on the day of Phillion’s confession – although Nadori recalled that it was not being kept where it should have been – and the officers differed between themselves as to when it was found. At one point during McCombie’s cross-examination at the preliminary hearing, Beaulne J. suggested to him that he should speak to other officers, including Detective Coburn, to fill in some of the “missing links”. Nothing apparently came of this.

Evidence of McCombie, Preliminary Hearing, Vol. 4, 340/50 to 341/15, 358/20 to 360/15, 370/1-40, 387/20 to 388/20, 399/20-30; Vol. 5, 437/20 to 438/20; Trial, Vol. 4, 793/20 to 794/20, 898/1 to 900/20
 Evidence of Norton, *Voir Dire*, Vol. 2, 403/20 to 404/40
 Evidence of Nadori, *Voir Dire*, Vol. 1, 258/40

213. As it happened, defence counsel had reason to believe that there was likely very little material in either McCombie’s main file or working file. At the preliminary hearing, Beaulne J. asked McCombie if his evidence was based solely on his memory. McCombie replied that it was, adding that he remembered the case “very vividly” and that “possibly with the exception of a date I think everything is from memory”. Similarly, he referred to no notes or documents while he gave his evidence at Phillion’s trial. The only report that McCombie acknowledged making was an “Investigation Report” which he had since read in January, 1972. Mr. Cogan asked him:

Q. And between January and October would you bother reading [the investigation report] to refresh your memory?

A. No, sir.”⁹⁷

McCombie failed to mention that he had written numerous reports on the case commencing the day

⁹⁷ This was likely an attempt by Mr. Cogan to gain access to the report. The state of the law of disclosure in 1972 was that access to a document only had to be granted to the defence if it had been used by the witness to refresh his memory before he testified. See *Appendix 1, paragraph 14*.

See also Evidence of McCombie, Preliminary Hearing, Vol. 4, for a similar, unsuccessful attempt by Mr. Cogan to obtain disclosure of the document.

of Mr. Roy's murder. Because of this, Mr. Cogan was acting under the mistaken belief that McCombie had prepared only the one "Investigation Report".

Evidence of McCombie, Preliminary Hearing, Vol. 4, 359/40; Trial, Vol. 4, 898/40 to 900/25; Vol. 5, 905/40 to 906/15

214. Detective McCombie testified at the preliminary hearing that by the time of the Inquest into Mr. Roy's death on November 2, 1967, he had interviewed all material witnesses of whom he was aware. He had not, however, as best he could remember, obtained written witness statements from any of them. He identified the witnesses to whom he had spoken as Mrs. Roy, Gail Brazeau, Mr. and Mrs. Barbe, and Mrs. Robitaille. As well, people who lived in 275 Friel and surrounding buildings were interviewed. McCombie distanced himself from the re-opening of the investigation in January, 1972 after his departure from it on January 1. Apart from discussing the file with Huneault and Nadori when they took it over, he claimed to have virtually no knowledge of their further investigation.

Evidence of McCombie, Preliminary Hearing, Vol. 4, 338/10, 377/40 to 378/40, 399/1; Trial, Vol. 5, 931/1 to 932/10

Did the New Liskeard Police question Mr. Phillion about the murder?

215. Detective McCombie testified that at no time did the New Liskeard police question Mr. Phillion about the murder. P.C. Brown of the New Liskeard police confirmed this in his evidence at the preliminary hearing. Brown testified that he "stayed completely out of that part of the investigation and just arrested him on the [Ottawa break and enter] warrant". He was asked:

Q. So then you went and arrested Mr. Phillion, and did you question him at all?

A. No, sir.

Brown's evidence in this regard is now open to question. On January 17, 1972, Brown told Detective Nadori that Phillion had told him of his whereabouts on August 9, 1967 (see paragraph 261 *infra*).

Evidence of McCombie, Preliminary Hearing, Vol. 4, 391/40 to 393/10
Evidence of Brown, Preliminary Hearing, Vol. 5, 426/45, 429/10
Investigative Report of Nadori, Jan. 17/72, Record, Vol. 2, Tab 103, p. 2

216. Evidence of Detective McCombie's conversation with Mr. Phillion in New Liskeard was not led at the trial, either on a *voir dire* or at the trial itself. It would not have been disclosed to Mr. Cogan (see Appendix 1, paragraphs 68 to 69 *supra*). Nor would he have received a copy of McCombie's August 13, 1967 investigation report. Mr. Cogan's suggestion to McCombie at the preliminary hearing that during the conversation Phillion "indicated he was elsewhere at the time", suggests that Mr. Cogan may have been relying on his client for the idea, rather than using information that had been disclosed to him.⁹⁸

⁹⁸ Mr. Cogan was aware of an occasion in April, 1971, when Phillion visited the Ottawa Police station to speak to McCombie. The information was contained in McCombie's willsay which was disclosed to Mr. Cogan. Phillion told McCombie that he had recently visited his brother, Donald, who was serving a life sentence for murder in Archambault Penitentiary. Donald, Romeo advised, wanted to give a statement regarding the murder, and would tell McCombie where the knife was. During submissions at the preliminary hearing about the admissibility of this evidence, Mr. Lindsay said:

"You Honour, the first thing I want to say to the Court is that I hope the Court will not think I am suppressing any evidence. This [conversation] is in the brief for Mr. Cogan to cross-examine on."

McCombie testified that the next day he went to Archambault and interviewed Donald but he was of no assistance.

Evidence of McCombie, Preliminary Hearing, Vol. 4, 353/30 to 358/20
Willsay of McCombie, Crown Brief, Record, Vol. 13, Tab 12
See paragraph 442 *infra*

(ii) ***Mr. Cogan knew of Mr. Phillion's statement to Detective Norton on January 12, 1972***

217. At 7:30 a.m. on January 12, the day after Mr. Phillion's confession, Detective Norton was asked by his superior officer to obtain more information from Mr. Phillion about what had happened to the knife that he had stolen from one of the apartments and used to kill Mr. Roy. By this time, Norton had had access to the 1967 police file, had given instructions and advice to Detectives Nadori and Huneault, both before and after Phillion's confession, had presumably read the confession, and had spent some considerable time with Phillion on their two drives to 275 Friel Street.

218. Detective Sgt. Norton had Mr. Phillion taken into a room near the cells. He asked him a series of questions about the knife that Phillion said he had used to stab the deceased. Norton asked him to explain where he had found the knife in the apartment that he had broken into. He asked him to describe the knife, and questioned him about disposing of it afterwards in the river. As we have seen (*supra* paragraph 59), he then asked:

"Do you remember selling the car radio in Trenton?"

Phillion replied:

"When did you find that? I sent my lawyer to check that out. My car broke down, I owed \$11.00 and I gave them the radio. Through the information from my lawyer I think I was in Trenton about the time the offence here was committed."⁹⁹

Norton testified, "I ceased asking him questions after that and he returned to the cell at 7:38."

Evidence of McCombie, *Voir Dire*, Vol. 2, 430/1 to 435/10

⁹⁹ Elsewhere in this brief, the veracity of Mr. Phillion's claim that he engaged the services of a lawyer to check out his Trenton alibi in 1967 is questioned (*supra* Footnote 78).

219. Mr. Cogan would have known of this conversation because it was in Detective Norton's willsay in the Crown brief. He had unsuccessfully attempted to elicit it into evidence during the *voir dire* at the preliminary hearing. The Crown objected to the evidence of the conversation being led.

Mr. Lindsay submitted to Beaulne J., the judge presiding at the preliminary hearing, that:

"This is a matter not tendered by the Crown. Mr. Cogan knows the contents of the statement although as I have not tendered it, it should not be referred to at this time. But I have no objection to Mr. Cogan's leading it up to the circumstances surrounding it. However it was not tendered by the Crown."

Mr. Lindsay further remarked:

"Throughout this preliminary inquiry, Your Honour, we have heard much evidence on a lot of aspects of this thing to which there might be other reference in the statement which I do not intend to tender. There is the fact that this question was asked by the officer the next morning. It has to be something that the court has confidence in the Crown to produce as to whether it will assist the court. But in my opinion I do not wish to tender the statement that Mr. Cogan is examining Detective Sergeant Norton about *and I have reasons for it which we may disclose at a later time after the preliminary inquiry is over*. But in my experience at this stage I do not wish to tender that statement for certain reasons."¹⁰⁰ (emphasis added)

Mr. Cogan's submissions also made it clear that he knew the contents of the conversation with Norton, which knowledge he would have acquired from Norton's willsay. At one point during argument, Mr. Cogan said:

"I submit that this is important evidence in demolishing the Crown's case and to show that my client was elsewhere at the time the crime was committed."

Beaulne J. ruled the contents of the statement to be inadmissible.

Submissions of Counsel, Preliminary Hearing, Vol. 7, 19/20, 23/40 to 24/5
Oral Judgment on *Voir Dire*, Preliminary Hearing, Vol. 7, 27/30-50

¹⁰⁰ The reasons that Mr. Lindsay had in mind when he said this are unknown. There is further comment on his position in Appendix 1.

220. During argument, some significant information was revealed as a result of Beaulne J.'s questioning of Detective Norton. There were two exchanges in this regard:

The Court: Let me ask one question of Detective Sergeant Norton. Don't tell us your conversation, but as a result of the conversation [at 7:30 a.m.] was there an investigation made of the substance of the conversation?

The Witness: Not by myself. He related certain things to me.

The Court: You can't tell us what they are.

The Witness: Not by myself, no.

The Court: Thank you. All right.

.....

The Court: May I ask a question: if we received all the facts before the statement that you take after cautioning the accused on January the twelfth, did the conversation relate to the continuous series of events on January the eleventh which came to light after the visit to 275 Friel Street, but from information?

The Witness: One of the questions did, Your Honour.

By the Court:

Q. And my second question is this: Could it have been asked the night before?

A. The day before?

Q. Well, day or night.

A. I don't believe so.

Q. Did this question come as a result? You have told us already one of the reasons you went back to 275 Friel Street the second time after you had got together and looked at the working file.

A. That is right.

Q. Did this question which you asked come out of a reading of the file?

A. It did.

Q. Did the reading take place after the accused came back until the following morning, or did the question arise out of the reading?

A. It was as a result of reading it over further after the second trip to 275 Friel Street.

Evidence of Norton, Preliminary Hearing, Vol. 7, 20/50 to 22/20

221. On the *voir dire* at Mr. Phillion's trial, upon Detective Norton testifying that he asked Mr. Phillion during their conversation, "Do you remember selling the car radio in Trenton?", defence counsel interrupted his testimony and asked:

Q. Before you go on with the answer, why did you ask that question?

A. This was information that I had learned from the main file.

Q. From the main file?

A. Yes.

Q. And would I be correct in saying that it was on the basis of something said by the accused back in 1967 - - -

Mr. Lindsay: Excuse me, I object to that question. That is a violation of the hearsay rule. It is a written assertion made by a person other than the witness who is testifying and this witness, in my submission, cannot testify about this sort of thing unless he has some direct knowledge of it.

Mr. Cogan: It is not offered, with respect, for the truth; I am asking what the basis was for the question and just the fact that he read something. I am not offering, in fact, that the witness did say that – I am not offering it for the truth and I submit in that case it is not hearsay and he does not, in fact, understand what I mean when I say that; *out of the blue the officer asks about a car radio in Trenton and I would like to know why he asks the question and I am not offering what he read on the file as the truth of what is on the file, it is something he read and surely, for that limited purpose – otherwise it does not make sense.*

Her Ladyship: Mr. Cogan, why is it not sufficient that he found it in the file, if you are tendering it only for that purpose.

Mr. Cogan: I will be content with that.

Q. So on the basis of something that was in the file, you asked him that question?

A. That is correct, sir. (emphasis added)

Norton then provided Phillion's answer to his question about him selling a car radio in Trenton.

Evidence of Norton, *Voir Dire*, Vol. 2, 433/40 to 434/50

222. From these exchanges at the preliminary hearing and the trial, it is apparent that Detective Norton had reviewed the April 12, 1968 report of Detective McCombie (see copy *infra*, at pages 178 to 179), or another document containing similar information, after returning from the second visit to 275 Friel Street. He had also had “a conference” about the case with Detective McCombie during the afternoon of January 11. He was, therefore, alerted to Phillion’s claim that his car had broken down in the Trenton area, around the time of the homicide, and that he therefore could not have committed the crime. He would have been further alerted to the knowledge that the police had checked this claim and verified that it was true.

Investigation report of Norton, Jan. 12/72, Record, Vol. 2, Tab 97

223. Mr. Phillion’s response to Detective Norton’s question was instructive, along with other remarks he made to police officers that morning, as it demonstrated Phillion’s confusion in 1972 about his whereabouts on August 9, 1967. Besides having already confessed to the crime itself, thereby placing himself in Ottawa on August 9, 1967, and having further told Norton after the first visit to 275 Friel Street that he had driven towards Arnprior after the stabbing, and then to Toronto via Trenton, and on to New Liskeard, Phillion subsequently made a series of conflicting and exculpatory statements. He responded affirmatively to Norton’s question the next morning about selling his car radio in Trenton, and remembered that that was what he was doing around the time of the murder. Fifteen minutes later, he told P.C. Aldrich that he was in Montreal at the time of the murder. Later the same morning, he told Aldrich that he was three hundred miles away when the murder happened.

Evidence of Aldrich, *Voir Dire*, Vol. 2, 457/10-40

224. When the defence embarked on cross-examining Detective Norton on the *voir dire* at Mr. Phillion's trial about this conversation with Phillion, the Crown objected immediately. Mr. Lindsay told the Court:

“The Crown is not tendering any statement in evidence after the second trip to the scene and, therefore, in my submission reference should not be made to them.”

Mr. Cogan responded as follows:

“Now, in fairness, I put it to Your Ladyship that the Crown ought not to be in a position to draw the line just because it may be that there were some exculpatory statements made on the 12th January. The Crown must take the good and the bad, and if the Crown is not happy that on the 12th, amongst other things, the accused made an exculpatory statement, does that give the right to the Crown to indicate it does not propose to lead it and say that it draws a line, that this is now a separate statement. What if Your Ladyship, on the evidence, finds it is interwoven with the events on the 11th January, then what is happening is you are deciding the voluntariness of statements on not the full statements made by the accused, if you do not find that the 12th flowed from the 11th. Now, is my friend in a position to tell Your Ladyship that the questioning and answers of the 12th are not related at all to the events that took place on the 11th and that the line can be that clearly drawn on the basis of his case? Perhaps if he can do that he is in a stronger position to say I ought not go into it.”

Submissions of Counsel, *Voir Dire*, Vol. 2, 417/30 to 419/30

225. The Crown responded to Mr. Cogan's submission by explaining that Mr. Phillion had made several exculpatory statements to police officers in which he had repudiated his confession before and after the 7:30 a.m. Norton conversation. The Crown continued:

“So that between the conversation that my learned friend is trying to elicit now and the time that the accused was returned to the cells there were three other statements and those statements in law, in my submission, *whether I like it or not* cannot be admitted because they are self-serving evidence and there is a direct exclusion of those statements.” (emphasis added)

Mr. Lindsay was quite wrong in this submission; the law was then, and is today, clear that *the Crown* could lead any and all statements that it chose to lead, inculpatory or exculpatory, provided it could prove that they were made voluntarily.

Submissions of Counsel, *Voir Dire*, Vol. 2, 419/30 to 421/15
R. v. Piche, [1970] 4 C.C.C. 27 (S.C.C.)

226. Mr. Lindsay then argued that Phillion's 7:30 a.m. statement to Norton was not, in law, a continuation of his previous statements, which consisted of the confessions the Crown was seeking to lead into evidence. The Crown submitted that the exculpatory statement to Norton, and to other officers, "are not so closely connected that the Crown must by law put them into evidence..." Mr. Cogan replied that "The Crown ought not to deal with strategy but to consider the rights of the accused".

Submissions of Counsel, *Voir Dire*, Vol. 2, 421/15 to 428/20

227. The Court adjourned for the day during the submissions. The next morning, the Crown withdrew his objection to Norton being cross-examined at the *voir dire* on the 7:30 a.m. January 12 conversation "without prejudice to any position I may take when the jury is recalled".

Submissions of Counsel, *Voir Dire*, Vol. 2, 428/30 to 429/30

228. There was no suggestion that, in these exchanges at the preliminary hearing and at the trial, Mr. Cogan knew of the contents of McCombie's April 12, 1968 report, or of the information contained therein; namely that the police had established in 1967 that Phillion had an alibi for the murder. In fact, the only other information provided to Mr. Cogan in the Crown brief in this regard, when combined with Huneault's evidence at the preliminary hearing, likely misled him. In the first place, Phillion himself had told Huneault, Nadori and Norton that he had driven to Toronto via Trenton *after* the homicide.

229. Secondly, in Huneault's willsay, which Mr. Cogan would have received by way of disclosure, it said:

"This witness will state that on January 21st, and 22nd, in company with Detective Nadori checked all the Service Stations in the area of Trenton, Ontario in the vicinity of Highway 401, checking all exit roads, interviewed the proprietors of all service stations within a four or five mile radius of that location and failed to find a Supertest Service Station which the accused alleges to have traded a radio for gas and service on the evening or early morning of August 9th or 10th, 1967. (emphasis added)

In his police reports (discussed *infra* paragraphs 264 and 265), which Mr. Cogan would not have seen, Huneault provided more details about this search.

Willsay of Huneault, Record, Vol. 13, Tab 23

230. Mr. Cogan questioned Detective Huneault about his checking the Trenton service stations at the preliminary hearing. After Beaulne J. had ruled that some of Mr. Phillion's statements were admissible, the Crown put Detective Huneault back on the witness stand for the purposes of further cross-examination by the defence. During this cross-examination, Mr. Cogan asked:

Q. Detective Huneault, *in the course of your investigation I understand that you were apprised of certain information given by the accused that he was elsewhere at the time that the offence was committed. Did you conduct an investigation in the area in or about the city of Trenton or town of Trenton?*

A. Yes, I did.

Q. Were you looking for a particular building or particular establishment that the accused had described to you?

A. The accused did not personally describe anything to me.

Q. Was it through information received from Detective McCombie?

A. Yes. *I was looking for a service station.*

Q. *You were looking for a service station but you did not come across one that you were able to relate to this accused?*

A. *No, I did not.* (emphasis added)

From Mr. Cogan's questions, the only reasonable inference that can be drawn is that *he had no idea that the police had already located the service station in 1967*. Detective Huneault knew of the 1968 report, and its contents, when he was asked these questions at the preliminary hearing. In a report that he wrote on January 13, 1972, he referred directly to the April 12, 1968 report and the need to "clarify [its] contents". His answers, to say the least, were less than forthcoming because he failed to tell Mr. Cogan that the service station had already been located *in 1967*.

Evidence of Huneault, Preliminary Hearing, Vol. 7, 58/40-50
Investigation report of Huneault, Jan. 13/72, Record, Vol. 2, Tab 98

231. A document handwritten by Mr. Lindsay headed "Re Trial Additional witnesses" is in the archives. One of the "additional witnesses" listed by Mr. Lindsay was "Service Station operators near Trenton." A reasonable interpretation of this entry is that Mr. Lindsay anticipated Mr. Phillion's defence might be the Trenton alibi. In preparation for this, he wanted to be ready to call the service station operators whom Huneault and Nadori interviewed in January, 1972, none of whom would have supported the alibi.

"Re Trial Additional Witnesses", Record, Vol. 12, Tab 4

232. Mr. Cogan would also have been deceived by the police synopsis of the case in the Crown brief which was probably disclosed to him. The synopsis, after recounting a version of the August 15, 1967 lineup, stated:

"In view of that, Phillion, had not been positively identified and that there was no other supporting evidence available, against him, it had been decided at this particular time that the charge of Murder, would not be pursued *until such a time that further evidence became available.*" (emphasis added)

There was no hint here that Phillion had, in fact, been cleared of involvement in the murder by Detective McCombie in 1967 or 1968.

Synopsis, Crown Brief, Record, Vol. 13, Tab 4

233. The synopsis then referred to the New Liskeard investigation, and stated:

“In April of 1968, certain information had been developed by the New Liskeard Police Department, subsequent to an interview with Gail Brazeau, and following that the above information was conveyed to Detective McCombie and Coburn, of the Ottawa Police, and investigation was again conducted in respect to Romeo Phillion, as a possible suspect, however the new information did not result in significant alteration of the evidence that was available in August 1967.

This, as will be seen, was a highly misleading and incomplete summary of the state of events in April, 1968.

Synopsis, Crown Brief, Record, Vol. 13, Tab 4

**(iii) Mr. Cogan knew what Mr. Phillion had told
P.C. Aldrich on January 12, 1972**

234. As has already been described, Mr. Cogan knew that at 7:47 a.m. on January 12, 1972, Mr. Phillion told P.C. Aldrich that he was in Montreal at the time of the murder. See paragraph 199 *supra*.

**(iv) Mr. Cogan knew the contents of Mr. Phillion's statement to
Detective Sgt. Norton and Detective Coburn on March 10, 1972**

235. On March 10, 1972, Mr. Phillion told Detectives Norton and Coburn in a three page typed

statement that in 1967 he had told McCombie “where [I] was at the time the murder happened” and “took a receipt out” as he spoke to him. He further claimed that in 1970, in the company of “two lawyers and a reporter”, they spoke “to every person that saw me on August 9th, 1967.” Remarkably, neither Norton nor Coburn asked Phillion *where* he had been on the day of the murder. The Crown successfully objected to Mr. Cogan’s attempts to elaborate on these claims of Phillion at the preliminary hearing. See paragraph 207 *supra*.

(b) **Detective McCombie’s Undisclosed Police Reports of April 12, 1968 that Established Mr. Phillion was in Trenton Shortly Before the Homicide**

Introduction

236. More than anything else, it is Detective McCombie’s two police reports from April 12, 1968, especially the one he wrote at 8:00 p.m., that suggest that Mr. Phillion has been convicted of a crime he did not commit. It is helpful to understand why this report came to be written, how its contents demonstrate that much information about the case is still missing today, and how Detective McCombie’s opinions developed after the August 15, 1967 lineup was viewed by Mrs. Roy.

(i) ***Inquiries conducted by the New Liskeard Police which led to Detective McCombie writing the April 12, 1968 8:00 p.m. investigation report***

237. Documents obtained from the New Liskeard Police Department reveal that on March 19, 1968, Mr. Phillion was arrested at 5:30 p.m. by the New Liskeard police as a result of a complaint that he had assaulted his 15 year old sister, Lucille. After his arrest, the New Liskeard police interviewed

his common-law wife, Gail Brazeau. She provided a statement on March 21, 1968 in which she alleged that Mr. Phillion had arranged for her to work as a prostitute on two occasions in New Liskeard. As a result, Mr. Phillion was further charged with living on the avails of prostitution.

New Liskeard Police Report, Statement of Lucille Phillion, Mar. 22/68, Record, Vol. 2, Tab 70/71

New Liskeard Police Report, Statement of Gail Brazeau, Mar. 21/68, Record, Vol. 2, Tab 69

238. Two weeks later, on April 4, 1968, Gail Brazeau was

“picked up for questioning [by the New Liskeard police] concerning her and Romeo Phillion’s movements during the early part of August, 1967 when the Roy murder was committed in Ottawa.”¹⁰¹

She provided a statutory declaration to the New Liskeard police in which she stated that she had seen Romeo Phillion on the Wednesday (August 9, 1967). He had parked his car across from her mother’s residence between 1:00 and 2:00 p.m. and was talking to the man who lived next door as he sat on the doorstep.¹⁰² Romeo then drove away. Ms. Brazeau spoke to the man who told her that Romeo had tried to sell his car to him for \$150.00. She further advised in her declaration that Romeo kept a hunting knife, with an 8 inch blade, in the glove compartment of his car. She had not seen this knife since. She remembered that he was dressed all in black when she saw him on Wednesday.

New Liskeard Police Report, Statement of Gail Brazeau, Apr. 4/68, Record, Vol. 2, Tab 73

¹⁰¹ It is apparent from the New Liskeard Police Department reports that they had considerable information about the homicide. It seems likely that they had obtained copies of all the reports generated by the Ottawa Police Department in the days following the homicide which, presumably, Detective McCombie would have given to them when he went there on August 12, 1967.

¹⁰² There is good reason to believe that Gail Brazeau’s statutory declaration was not disclosed to the defence.
See Appendix 1, paragraph 75

239. On April 4, 1968, P.C.s. Brown and Bolger interviewed Mr. Phillion at the Haileybury District Jail where he was awaiting trial for his outstanding charges. After advising him that he could be charged with Mr. Roy's murder, and giving him a caution, he was asked:

Q. Do you wish to say anything in connection with the death of Mr. Leopold Roy?

A. I don't even know the guy. I never even seen him before, I don't know where you get the impression.

That was the full extent of the interview as recorded.

New Liskeard Police Report, Statement of Romeo Phillion, Apr. 4/68, Record, Vol. 2, Tab 74

240. On the same date, P.C. Brown of the New Liskeard police wrote to Detective McCombie as follows:

Dear Sir:

RE: Romeo PHILLION
FPS.# 832442

Please find attached a statement taken from Gail BRAZEAU concerning the movements of herself and the above mentioned around the time of the murder of Leopold Roy in Ottawa. Also attached is a Statutory Declaration concerning this statement.

Following the taking of this statement we had Gail BRAZEAU pick out a knife from a local store that was similar to the one that PHILLION always carried and which disappeared around the time of the murder. We had this knife photographed and enclosed is a picture of the actual size of the knife. This knife is the same size as the one PHILLION was reported to have carried in his vehicle and sometimes on his person also the same large finger guard and the handle is black in colour and smooth.

We will interview more persons here in New Liskeard who were with PHILLION when he came to this area last August and who might be able to shed some light on the disappearance of the black clothing and the missing knife. Because if my memory serves me right PHILLION was wearing clothes that belonged to his brother at the time of his arrest on August 12th here in New Liskeard.

A full report of our progress to date on this case will be forwarded to your office in hopes that it maybe of some assistance to you in your investigation.

Hoping this statement is of some assistance to you, I remain

Yours truly

Letter dated Apr. 4/68 from P.C. Brown to Detective McCombie, Record, Vol. 2, Tab 73

241. During his questioning of Detective McCombie at the preliminary hearing, Arthur Cogan almost stumbled into the 1968 New Liskeard police investigation which, in turn, led to the generation of the April 12, 1968 8:00 p.m. report. It was only McCombie's actual, or professed, lack of memory that prevented Mr. Cogan from discovering the truth. Following are questions and answers which could have provided the necessary evidence to alert Mr. Cogan to the essence of the undisclosed material:

Q. Is [Phillion's arrest] the extent of the New Liskeard Police's involvement with respect to this matter?

A. Yes.

Q. Did you subsequently receive any information from them that may be relevant to this case?

A. Yes, there was a later contact. I cannot recall the nature of it.

Q. Do you know when that was?

A. I don't, sir.

Q. From the time you arrested the accused?

A. No.

Q. You do not know the nature of it?

A. I do not recall now.

Q. Would that be in your notes, or in your working paper investigation report?

A. I do not know, sir. (emphasis added)

Mr. Cogan presumably asked these questions as a result of a highly misleading paragraph in Detective McCombie's willsay, which was disclosed to him, in which it was written:

"That in April 1968, certain information had been received and developed by the New Liskeard Police Force, and following an interview between Gail Brazeau and the New Liskeard Police Force information was conveyed to him, however as a result of the following investigation, no new evidence was discovered."

There was a similar recounting of this in the police synopsis of the case. There was, however, no reference in McCombie's willsay to the contents of his April 12, 1968 police reports. The questioning of McCombie continued:

THE COURT: Q. Was it after the accused had been released or before the accused had been released that you received some information from the New Liskeard Police?

A. You are referring to the second occasion after he returned here?

Q. Yes.

A. I do not know when the accused was released, Your Honour. He was released by me on the 15th but kept in custody on the other charge. How long he was in custody, I don't know.¹⁰³

MR. COGAN. Q. But this was after you released him with respect to this matter?

¹⁰³ In a report prepared by McCombie dated September 15, 1967, he responded to a query from the North Bay Police Department, who had arrested Phillion on a stolen goods charge, about the bulletin issued by Ottawa on August 10 that Phillion was wanted for questioning on the murder. McCombie wrote:

"Detective Leppan [of the North Bay police] was also informed that Phillion was to appear in Magistrate's Court here on September 14th, at 2:00 pm on a housebreaking charge and he did not appear at that time and due to the fact that there was no evidence to present, the case was withdrawn against him at that time."

Phillion had been released on the housebreaking charge on some form of bail after Mrs. Roy failed to pick him out at the identification lineup on August 15, 1967. It was in this period that he was alleged by Marilyn Cote to have stolen her car. According to Phillion's post-sentence report prepared after his murder conviction, the North Bay stolen goods charge was subsequently withdrawn.

Investigation Report of McCombie, Sept. 15/67, Record, Vol. 2, Tab 40

A. Yes.

Q. Which is all that we are concerned with here. I take it that the accused was driven back to Ottawa?

A. Yes.

Q. In a car in which you were?

A. Yes.

Q. Was there any discussion in the car about this matter?

A. I don't recall.

Q. Could there have been a discussion?

A. There could have been. (emphasis added)

In summary, Mr. Cogan came so near, and yet so far, from the truth.

Evidence of McCombie, Preliminary Hearing, Vol. 4, 392/1-50

242. As well, any interest that Mr. Cogan may have had in post-1967 events would have been lessened by Detective Nadori's evidence at the preliminary hearing when he said:

"To begin with, to my knowledge, *this investigation had been dormant from some time in 1967*. The very first time that I saw the file in connection with the Roy investigation as when I left the questioning room [on January 11, 1972] to get it just preceding the taking of the statement from Mr. Phillion. That evening sometime I saw Mr. McCombie at the police station speaking to somebody, but I personally have not spoken to him in connection with this investigation." (emphasis added)

If Nadori had read the full police file, which he testified that he had, he must have known that this answer was untrue. There had been some extremely significant developments in the investigation in 1968. Huneault's investigation report for January 13, 1972, also disclosed that Nadori's claim never to have spoken to McCombie in connection with the investigation was untrue. In this report, Huneault wrote:

“Approximately 20:00 hrs., on January the 12, Lt. John McCombie, D/Sgt. Norton, Det. Nadori and myself reviewed the contents of the file of the initial investigation of this occurrence, as Lt. McCombie was unavailable prior to this time due to his attending a course at the Canadian Police College. As a result of the discussion and viewing of the initial investigations file, Det. Nadori and myself have submitted the following list of investigations to be conducted, Superintendent Flanagan being provided with a copy, and they are as follows, for the purpose of clarifying certain aspects of the initial investigation of occurrence, 19,693/67, an investigation of subsequent events we proposed to take the following steps.”

Huneault then wrote out his lengthy “to do” list which is referred to on several occasions in this Part of the Memorandum.

Evidence of Nadori, Preliminary Hearing, Vol. 6, 599/30-40
Willsay of McCombie, Crown Brief, Record, Vol. 13, Tab 12
Synopsis, Crown Brief, Record, Vol. 13, Tab 4
Investigation Report of Huneault, Jan. 13/72, Record, Vol. 2, Tab 98

(ii) Detective McCombie’s investigation report of April 12, 1968 at 8:00 p.m.

243. On April 12, 1968, at 8:00 p.m., Detective McCombie prepared an investigation report as a response to the New Liskeard Police Department’s re-investigation. The report reads in full as follows:

The Investigation Report prepared by Detective McCombie on April 12, 1968 at 8:00 p.m.

On January 22, 1972, Lt. Lowry was told by McCombie that he had found the service station on the south side of Highway 401 near Trenton.

Investigation Report of McCombie dated Apr. 12/68, Record, Vol. 2, Tab 75
Investigation Report of Huneault, Jan. 23/72, Record Vol. 2, Tab 108

244. This application is, to a large extent, based on numerous police investigation reports which only began to come to light in 1998 (see paragraph 26 *supra*). But it is this April 12, 1968 investigation report of Detective McCombie, one of two that he wrote that day, which constitutes the lynch pin of this application. It not only provides Mr. Phillion with a rock solid account of his whereabouts at the time of Mr. Roy's murder, but also establishes that *the investigating officer* believed it was rock solid *after* he had conducted an investigation of it. As well, as will be seen, the same report proves that the evidence being offered by Mr. and Mrs. Barbe, and Mrs. Brazeau and her daughter Gail, in 1972 which proved Mr. Phillion was in Ottawa *after* the murder, was wrong. Finally, as will be seen, the evidence proves that the Crown, and the investigating officers in 1972, knew of the report's existence, read its contents, and acted on its contents, but never disclosed it, or its contents, to the defence.

A. *When did Mr. Phillion tell Detective McCombie of his adventure in Trenton?*

245. Since Phillion himself was the only possible source for the information that he had been at the service station in Trenton getting his car fixed in the early afternoon of August 9, the question arises: when had he told the police this? There are two possible answers to this question:

1. As has been seen *supra* paragraph 204, Phillion was interviewed by McCombie and Coburn on August 13, 1967 when they picked him up in New Liskeard and then drove him to Ottawa for the identification lineup. McCombie testified that they interviewed him about the murder shortly after arresting him on the break and enter warrant at 8:00 a.m.. The contents of the conversation were not elicited but McCombie testified at the preliminary hearing that Mr. Phillion told them his “whereabouts” on the day of the murder without stating where Phillion said he was. However, in an investigation report dated August 13, 1967, McCombie wrote:

“At approx. 8:00am we interviewed Phillion in regards to the warrant on the house breaking and he denied any knowledge and at the same time he was warned and told of our invst. regarding the murder and at that time denied any knowledge of this offence and *stated that he was in New Liskeard at the time of the commission of the offence.*” (emphasis added)

The simplicity of McCombie’s claim that Phillion said he was in New Liskeard on August 9, in light of his investigation of the service station in Trenton, is open to question. Without McCombie’s notes, which had been lost by 1972, or the notes of Detective Coburn, the issue cannot be resolved. Phillion may have told McCombie he arrived in New Liskeard on “August 9” or “on Wednesday”, but also told him of his breakdown on the way in Trenton which caused McCombie to investigate this part of his claim only to discover that he was actually broken down in Trenton around the time of Mr. Roy’s murder.

Investigation Report of McCombie dated Aug. 13/67, Record, Vol. 2, Tab 26

2. Phillion may also have been questioned by the New Liskeard police when he was arrested by them on August 13, 1967 on the Ottawa warrant. McCombie testified at Phillion’s preliminary hearing that he was told by the New Liskeard police that they had not questioned him. P.C. Brown made the same claim but, on January 17, 1972, told Nadori otherwise (*supra*, paragraph 215). However, the New Liskeard police knew by April 4, 1968, and likely long before that, about Phillion being held up in Trenton on August 9, 1967 because, while questioning Gail Brazeau on *April 4*, 1968, in New Liskeard, P.C.s Brown and Bolger asked her:

Q. Did Romeo ever tell you about having to get his car towed into a garage near Trenton or Toronto?

A. *No.* (emphasis added)

This question put to Gail Brazeau is very revealing. It was asked eight days before McCombie was to draft his response to the New Liskeard re-investigation. The New Liskeard police could only have got their knowledge of the Trenton garage from one of three sources:

- from Romeo Phillion himself when he was in New Liskeard police custody in August, 1967 or, less likely, in 1968 when he was arrested for assaulting his sister,
- from McCombie or Coburn in person, or
- from a report prepared by McCombie or Coburn.

If it was the last of these sources, there is no such investigation report in the archives. The first Ottawa police investigation report which refers to the service station in Trenton is McCombie's April 12, 1968 report, which was written eight days *after* the question was posed to Gail Brazeau, and was prepared *in response* to the New Liskeard information.

Investigation Report of McCombie, dated Aug. 13/67, Record, Vol. 2, Tab 26

Investigation Report of Nadori dated Jan.17/72, Record, Vol. 2, Tab103

New Liskeard Police Report, Statement of Gail Brazeau, Apr. 4/68, Record, Vol. 2, Tab 73

B. *When did Detective McCombie verify Mr. Phillion's adventure in Trenton?*

246. It should be noted that McCombie did not state in his report when it had been verified that Phillion was at the service station in Trenton on the day of the homicide. It seems likely that it was done in August, 1967, either when he returned from New Liskeard to Ottawa with Phillion but before Mrs. Roy viewed the in-person lineup on August 15, or shortly thereafter. It seems less likely that it occurred in response to the New Liskeard police contacts in April, 1968 if only because it seems unlikely that the "service station operator" in Trenton could have provided a ready answer to the

query nine months later in April, 1968. Additionally, if this were the case, the New Liskeard police officers would have had to have found out about the Trenton garage from a source other than McCombie. In February, 1999, McCombie advised members of the *Innocence Project* that when he spoke to the operator of the service station, he was given the radio by him or her (*infra*, paragraph 366). Once again, this is consistent with McCombie going there shortly after he apprehended Phillion in New Liskeard August 13, 1967 as it seems doubtful that the operator would have kept the radio for a long period of time. Having verified the story in August, 1967 would also be consistent with the contents of McCombie's September 15, 1967 report. On that date, he reported that Detective Leppan of the North Bay Police Department had telephoned to inquire whether Phillion was still wanted as stated in an August 10 bulletin from the Ottawa police. McCombie wrote in his report:

“... I returned the call to Detective Leppan and explained the circumstances to him *and that this Department no longer had any interest in Phillion.*” (emphasis added)

Admittedly, he could have simply been relying on Mrs. Roy's failure to identify Phillion at the lineup on August 15, 1967 to make this statement.

Investigation Report of McCombie, Sept. 15/67, Record, Vol. 2, Tab 40

247. Whether Mr. Phillion told Detective McCombie or members of the New Liskeard Police Force, or both, in August, 1967, that he broke down on the highway outside Trenton on his way to Toronto, McCombie must have become aware of his claim, whether directly or indirectly, because he investigated it and established that it was true, and provided an alibi to Phillion for the murder.

See paragraph 210 *infra*

C. *Inspector Soucie's March 4, 1968 investigation report, prepared "for Detective McCombie"*

248. Mention should also be made of a police investigation report dated March 4, 1968, written by Inspector Soucie "for Det. McCombie" seven weeks before McCombie's April 12 report. On March 4, Inspector Soucie and Detective Black interviewed one Jimmy Hysen alias Howe who told them that the two brothers he had heard the police were looking for had left town on the day of the homicide. Soucie reported:

"This information is very consistent with the fact that Det. McCombie, a few days following the murder, did conduct extensive investigation in order to locate the Phillion brothers, Romeo and Donald, *and he finally did eliminate them as suspects.*" (emphasis added)

This last statement strongly supports the view that McCombie had investigated the Trenton alibi in August, 1967. It would not be appropriate to describe Mrs. Roy's reactions at the August 15, 1967 lineup as *eliminating* Romeo Phillion (or his twin brother) as a suspect.

"A. Soucie for Det. McCombie", Investigation Report, Mar. 4/68, Record, Vol. 2, Tab 66

D. *Detective McCombie's 9:00 p.m. investigation report for April 12, 1968*

249. Detective McCombie wrote two reports on April 12, 1968. The first, which amounted to a response to the New Liskeard queries, was written at 8:00 p.m. The second was written at 9:00 p.m. and described the investigation of one Robert Miner as a possible suspect in the homicide. McCombie commented that if Mrs. Roy were to identify anyone as the intruder in the future, the police

“...would be helpless in charging him with the murder unless there was corroborating evidence and the evidence of identification evidence alone would come under very heavy attack in the Court due to the fact that she has already identified someone *and this was not the person.*”

The “someone” was Romeo Phillion. McCombie was obviously convinced that Phillion was not the culprit when he wrote these reports.¹⁰⁴

Investigation Report of McCombie, Apr. 12/68, Record, Vol. 2, Tab 76

(iii) *Romeo Phillion’s letter to Gail Brazeau*

250. Phillion wrote a letter to Gail Brazeau after he arrived in New Liskeard. Ms. Brazeau gave it to McCombie in Ottawa on August 12, 1967. The letter was postmarked for 4:00 p.m. on August 11, 1967 in New Liskeard. It was written in French. The English translation includes the following:

“When I left Ottawa, I went to Toronto to Armand [one of Romeo’s brothers] and I continued here, in New Liskeard.

Today at the garage, I fixed my car and it starts well now. Everything is in order with the car.”

This passage suggests that Phillion arrived in New Liskeard before August 11 (see paragraph 203 *supra*). If Phillion was on the highway near Trenton on the afternoon of August 9, then drove to

¹⁰⁴ The tone of this report of Detective McCombie is to be contrasted with the tone of the synopsis of the case provided to Mr. Cogan as a part of disclosure. In the synopsis, in referring to the time when Mrs. Roy failed to pick Mr. Phillion from a line-up on August 15, 1967, it was written:

“In view of that Phillion had not been positively identified and that there was no other supporting evidence available against him, it had been decided at this particular time that the charge of Murder would not be pursued until such a time that further evidence became available.”

This is a far cry from the tone of McCombie’s April 12, 1968 report. Crown Synopsis, Record, Vol. 13, Tab 4

Toronto and on to New Liskeard, it could well be that he arrived in New Liskeard late in the evening on August 9, or early in the morning on August 10. In his letter to Gail, Phillion also stated that he had had his car fixed, consistent with it having broken down in Trenton *en route* from Ottawa to Toronto, and New Liskeard. On January 24, 1972, Donald Phillion, when interviewed by the police at Archambault Penitentiary, told them that when he returned from work on the day Romeo showed up in New Liskeard, he “assisted Romeo in fixing Romeo’s ford convertible as there was something wrong with the engine of the car and the ignition that was apparently malfunctioning.”

Evidence of Gail Brazeau, Preliminary Hearing, Vol. 4, 312/30
 Letter from Romeo Phillion to Gail Brazeau, Record, Vol. 14, Tab 10
 Investigation Report of Nadori, Jan. 25/72, Record, Vol. 2, Tab 109

(iv) Romeo Phillion’s suggestion that Detective McCombie speak to his brother Donald

251. On March 25, 1971, Mr. Phillion went to the Ottawa Detective Office and told Detective McCombie that he had been visiting his brother, Donald Phillion, who was by now serving a life sentence for murder in the Archambault Penitentiary in Montreal. Romeo told McCombie that Donald wanted to confess to Leopold Roy’s murder. In his April 2, 1971 report, McCombie wrote:

“He further stated that Donald would tell me where the knife was and of the stealing of a car immediately after the murder and abandoning it in the Pembroke area.”

After his arrest, in his March 10, 1972 statement to Detectives Norton and Coburn, Phillion referred to his conversation with McCombie on March 25, 1971. He told them that, in the previous spring:

“I decided to go and visit my brother Donald Phillion and ask him if he wanted to help me in solving this case. He wanted to at first but I decided not to for [Donald’s] protection from other inmates. He asked me to see the reporter Charles King and to see McCombie. That is, Donald wanted to see the reporter and McCombie. I asked Charles King to go and see my brother. Charles King did. I saw McCombie and he didn’t want to hear anything about

it. There I decided to want to talk to McCombie about it and he did not want to hear anything about it.”

Phillion’s Statement, Mar. 10/72, Record, Vol. 14, Tab 5
Investigation Report of McCombie, Apr. 2/71, Record, Vol. 2, Tab 88
Evidence of Norton, Preliminary Hearing, Vol. 7, 31/20 to 33/40

252. Before going to see McCombie at the police station, Romeo had already spoken to the Ottawa Citizen reporter Charles King, and told him that Donald wanted to confess to the crime. According to King, Romeo told him:

“It’s been bugging [Donald] and he wants to get it off his chest.”

King went to see Donald at Archambault Penitentiary on March 30, 1971. He did not report on this aspect of his visit until January 17, 1972, six days after Romeo’s arrest. He then wrote:

“It was a strange feeling to sit down across the desk from a young convicted killer who was identical in appearance to the one who had called at my office a few days before. But if I had gone in anticipation of hearing a murder confession, the trip was non-productive.

‘I know nothing about it’, Donald insisted. ‘I don’t know what Romeo has been telling you, I know nothing about this beef at all.’

When I confronted him with a police poster offering a reward of \$2,500 for information leading to the conviction of the Friel Street slayer, he showed new interest.

‘Romeo’s after this,’ he said matter-of-factly of his twin. ‘Let’s face it. He did it once. Now who says he’s not trying to do the same thing – collect this and put the beat on me again, see?’

Brother to brother

Back in Ottawa, I called Romeo and told him what his brother had said. He came to the office and listened to the tape recording I had made of our conversation in the prison.

He shrugged his shoulders, ‘Well, he told me one thing and he told you another thing,’ he said resignedly. ‘I guess that’s all we can do.’”

“Twins behind bars: A case history”, Ottawa Citizen, Jan. 17/72, Record, Vol. 7, Tab 32

253. Donald had himself been writing to Charles King since 1969, claiming that he was innocent of the double murder for which he was serving a life sentence. On March 31, 1971, the day after he interviewed Donald at Archambault, King published his first story on Donald's claim of innocence in the Ottawa Citizen, without reference to Romeo's claim that Donald would confess to Mr. Roy's murder, but with a promise of follow-up columns (which he, in fact, wrote on April 2, 1971 and April 5, 1971).

"A conversation with a murderer (1), (2) and (3)", Ottawa Citizen, Mar. 31/71, April 2/71 and April 5/71, Record, Vol. 7, Tabs 23, 24 and 25

254. As a result of what Romeo told him on March 25, 1971, and with Charles King's column in the Ottawa Citizen as a likely catalyst, on April 1, 1971, Detective McCombie, accompanied by Detective Halliday, went to Archambault himself and interviewed Donald. Donald denied telling his brother Romeo that he wanted to confess to Mr. Roy's murder. McCombie reported:

"[Donald] further attempted to question us in reference to the murder and that it was his belief that the murder had happened during the night and that it would have been possible for him to come from New Liskeard, Ontario and commit the murder. He further requested that we take him in custody and return him to Ottawa at which time he would have an opportunity to defend himself against the charge and stated that he would speak to no one other than a lawyer."

Donald told the police that he disliked Archambault and might "make his time served worthwhile by running a knife into the screws in the institution."¹⁰⁵

Investigation Report of McCombie, Apr. 2/71, Record, Vol. 2, Tab 88

¹⁰⁵ On April 1, 1971, Donald told McCombie that Charles King had been to see him two days earlier. Donald again spoke of his meeting with King when he was further interviewed at Archambault on January 24, 1972 by Huneault and Nadori. The purpose of this interview was to see whether Donald could provide evidence in support of Romeo's prosecution for the murder. Nadori reported that "[Phillion] spoke quite bitterly of a Mr. King, a newspaper man from Ottawa, who apparently came to interview him in relation to the murder concerned in 1971."

"Twins behind bars: A case history", Ottawa Citizen, Jan. 17/72, Record, Vol. 7, Tab 32

Investigation report of McCombie, Apr. 2/71, Record, Vol. 2, Tab 88

Investigation report of Nadori, Jan. 25/72, Record, Vol. 2, Tab 109, p. 2

255. Mr. Cogan had the existence of this conversation disclosed to him. Detective McCombie's willsay in the Crown brief included the following:

“Will state that on March 25th, 1971, at 4:00 p.m., Romeo Phillion, came to the Detective Office, at #1 police station, in Ottawa and advised Detective John McCombie, that his brother, Donald Phillion, who was presently serving a life sentence for murder in a Quebec penitentiary was the person responsible for a 1967 murder of Mr. Leopold Roy.

At this time he will indicate that Romeo Phillion indicated to him that Donald would be ready to confess to the murder concerned. That as a result, he accompanied by Detective Dean Halliday proceeded to the Archambault Institute in Quebec and had a conversation with Donald Phillion, however subsequent to this conversation, no further actions were taken.”

McCombie was questioned about this conversation at the preliminary hearing.

Willsay of McCombie, Crown Brief, Record, Vol. 13, Tab 12
Evidence of McCombie, Preliminary Hearing, Vol. 4, 353/30 to 358/20

256. At the conclusion of his April 2, 1971 report, Detective McCombie wrote:

“It is the opinion of the writer and Detective Halliday that [Donald Phillion] had nothing to do with the murder and as mentioned above, is attempting to be removed from the Archambault Institute where [he] may have an opportunity to escape. Also it is *still* the writer's contention that the person responsible for the murder is Romeo Phillion who is a twin brother of Donald and that due to lack of identification and other evidence we are unable to proceed with a charge at this time.” (emphasis added)

This is the only occasion in any of the police reports that McCombie repudiates his belief, expressed in his two April 12, 1968 reports, that Romeo was not responsible for Mr. Roy's murder. There is no explanation in any police report for McCombie's change of opinion, a change that he had apparently made sometime before this conversation with Romeo.

Investigation Report of McCombie, Apr.2/71, Record, Vol. 2, Tab 88

(v) ***The reaction of the 1972 investigators to the April 12, 1968 8:00 p.m. investigation report***

257. The police who re-investigated the case after Phillion's confession knew of the Trenton alibi. As has been seen, on January 12 Detective Sgt. Norton asked Phillion about it. It is worth repeating again this part of their conversation as related by Norton:

Q. Do you remember selling the car radio in Trenton?

A. When did you find that? I sent my lawyer to check that out. My car broke down, I owed \$11.00 and I gave them the radio. Through the information from my lawyer I think I was in Trenton about the time the offence here was committed.

Norton testified that he obtained the information to ask this question from the "main file". The Trenton alibi was, therefore, in the police file in the form of McCombie's April 12, 1968 8:00 p.m. report and/or other reports.

Evidence of Norton, *Voir Dire*, Vol. 2, 433/45 to 434/10

258. Detective Sgt. Norton testified that their conversation concluded with Phillion's response that he thought he was in Trenton around the time of the homicide. Norton testified, "I ceased asking him questions after that". This seems unlikely in the circumstances. Phillion, who had confessed to the murder the previous afternoon, had now suddenly confirmed an alibi, the existence of which Norton had just discovered in the original police files. It is hard to comprehend how Norton could have simply let matters rest there – even more so when one considers that he probably knew by this time that Phillion had already repudiated his confession to P.C. Couture in the cells, and he had watched Phillion's disastrous first attempt to re-construct the crime at 275 Friel Street. It would have been tantamount to a neglect of duty for Norton to terminate the conversation when he claims that he did.

Evidence of Norton, *Voir Dire*, Vol. 2, 434/40

259. Detective Norton's claim that the conversation concluded when he says it did is rendered more curious by his investigation report for that date. His report ended with Phillion's answer to his last question but omitted the last three words of the conversation recorded in his notes, and to which he testified on the *voir dire*. Thus, his report said:

Q. Do you remember selling your radio in Trenton, Ontario?

A. When did you find that? I sent my lawyer to check that out. My car broke down, I owed \$11.00 and I gave them the radio. Through the information from my lawyer I think I was in Trenton about the time the offence [here was committed.]

The report then concluded with the words:

“– unable to transcribe further due to doubling at the end of the tape.”

The inability to transcribe the balance of the tape provides a ready answer to the lack of credibility of Norton's claim that the conversation ended with Phillion's answer. It is more likely that the conversation continued while Norton tried to find out more from Phillion about the Trenton alibi. It also seems too coincidental that the tape ran out at such a time that only the last three words of the conversation were lost.

Investigation Report of Norton dated Jan.12/72, p. 3, Record, Vol. 2, Tab 97
Notes of Norton, Record, Vol. 14, Tab 17

260. In any event, the police reports in the main file and, likely, Phillion's response to Norton on January 12, when asked about selling his car radio in Trenton, resulted in attempts by police to locate the service station in Trenton in January, 1972. On January 13, 1972, Detective Huneault listed in

an investigation report a number of investigative steps that had to be undertaken. One step was as follows:

“Attempt to clarify the contents of the investigation report submitted by Lt. McCombie dated April 12, 1968.”

This was almost certainly a reference to the report that McCombie wrote at 8:00 p.m. that day.

Investigation Report of Huneault, Jan. 13/72, Record, Vol. 2, Tab 98

261. On January 17, 1972, Nadori spoke to P.C. Jack Brown of the New Liskeard police, one of the officers who had arrested Phillion on August 13, 1967. Nadori reported that Brown told him of some of the events in New Liskeard in August, 1967 including Phillion’s arrest on August 13. In his report, Nadori also wrote:

“Cst. Brown ... stated that following the arrest of PHILLION on August 13, by himself, he recalls having a conversation with this person at which time PHILLION told him that on Aug. 9, 1967 he had been stopped by the Ontario Provincial Police as he was leaving a Shell service station just “south” of Arnprior.

PHILLION further informed the above officer that *during the evening* of the day that the murder had been committed (August 9, 1967) he ran out of gas on a highway near Kingston, Ontario and that the police found him there and that he was driven by a police officer to a nearby gas station to purchase gas.” (emphasis added)

This is the only time that this version of events appears in any of the materials. Its reliability is questionable for several reasons.

- It contradicts the April 12, 1968 report of Detective McCombie, written four years earlier, in which he records what Phillion must have told him in 1967.
- It is unsupported by any of the 1967 New Liskeard police reports.
- It contradicts McCombie’s evidence that Phillion told the New Liskeard police nothing of significance.

- No one else has recorded the suggestion that a police officer drove Phillion to a gas station after he ran out of gas, and McCombie would have presumably acquired this information, if true, when he spoke to the operator of the service station, and was given the car radio.
- Brown was purporting to recall a conversation, apparently unrecorded in any form, four and a half years after the event.
- Brown gave this information to Nadori on January 17, 1972, or at least Nadori recorded it as such on that date. By this time, Huneault, Nadori and Norton all knew the Trenton service station “problem” created by the 1968 police reports. Brown’s information coincided with what Phillion had told Norton and Huneault after the first trip to 275 Friel Street, insofar as he had told them that he had driven in the direction of Trenton *after* the homicide. It seems too conveniently coincidental that Brown happened to remember that he had had a similar conversation with Phillion in 1967. Brown’s 1972 version did not even accord with the question he and Bolger posed to Gail Brazeau on April 4, 1968, namely “Did Romeo ever tell you about having to get his car towed into a garage near *Trenton or Toronto?*” (emphasis added)
- Finally, at the preliminary hearing, Brown had denied questioning Phillion at all. He was asked:
 - Q. So then you went and you arrested Mr. Phillion, and did you question him at all?
 - A. No, sir.
 - Q. You brought him back to the station?
 - A. I lodged him in our cells.

262. Finally, it does not accord with a report prepared by Brown on the same date that Nadori recorded his version of their conversation. Brown prepared his report, which was a history of the New Liskeard Police Department's dealings with Phillion in 1967, presumably in response to a request by Nadori when they spoke on the telephone that day. Brown first wrote a history in longhand, and then typed up a more detailed history. The only reference in either report to Phillion's car running out of gas was in the handwritten report which included the following:

“Aug. 3rd N.B. [North Bay] OPP checked at 5:30 a.m.
Received ticket from OPP
Ran out of gas priest assisted him”

It is known that Phillion was checked by the North Bay police on August 3, 1967 as he and Gail Brazeau were driving to Ottawa. It seems too coincidental that Phillion told Brown that he ran out of gas *twice* in one week. Significantly, there was no reference in either of Brown's reports to Phillion having told him anything about his whereabouts on the day of the murder.

Investigation Report of Brown and other reports forwarded by him to Nadori, Jan. 17/72, Record, Vol. 2, Tab 102

263. On January 19, 1972, Nadori reported as follows:

“Also on this date a telex message had been received from the Brighton Detachment of the O.P.P., this being in response to our telex sent to the Peterborough District of the O.P.P. on January 17th, 1972. It may be noted at the time that the Brighton Detective covers the patrol of Highway no 401 in the vicinity of Trenton, Ontario. According to the message personnel of the above detachment who were on duty on August 8th, 9th and 10th, 1967 [they] were canvassed and none of those officers recalled having encountered Romeo Phillion and his car while the subject was asleep in his car out of gas. It is presumed by the writer that the above conclusion has been reached after that the personal notes and Dept. files have been checked as it had been requested by the writer.”

Nadori's attempt to corroborate Brown's information, therefore, failed.

Investigation Report of Nadori, Jan. 19/72, Record, Vol. 2, Tab 106

264. On January 23, 1972, Detective Huneault authored an investigation report. In it, he related that on January 21, 1972, he and Nadori drove from Ottawa to Toronto to locate and interview a potential witness, Gail Chartrand, who had been Donald Phillion's girlfriend at the time of Mr. Roy's murder and now lived in Richmond Hill, north of Toronto. Huneault's report continued:

“Also it was our purpose at this time to check service stations in the area of Trenton, Ontario, in an attempt to locate a particular service station where the accused Romeo Phillion alleges that *on or about August 10th, 1967*, he had occasion to change his car radio for gas and services. (emphasis added)

Huneault's suggestion that Phillion had been in Trenton on August 10 (although the use of the term “on or about” is of interest) must have come from Phillion's confession. He claimed that after stabbing Mr. Roy:

“Around eleven-thirty that night I drove to Trenton, Ontario, the next day I went to Toronto and then to New Lisgar (sic), Ontario.”

From this, Huneault could infer that Phillion reached Trenton in the early morning hours of August 10, 1967. In preparing his report, Huneault may then have combined aspects of his own knowledge of what Phillion had told him on January 11, 1972 with aspects of the knowledge he had acquired from McCombie's 1968 report, that Phillion had exchanged his car radio at the Trenton service station. However, in the process Huneault conveniently ignored the most important feature of McCombie's report; that McCombie had confirmed his presence at the garage in Trenton at the time of the murder, not much later in the night after the murder.

Investigation Report of Huneault, Jan. 23/72, Record, Vol. 2, Tab 108

265. Huneault's report of January 23 went on to say:

“Leaving Ottawa at approximately 1300 hours, we proceeded immediately to Trenton, Ontario, on 401 Highway, and at that time checked the two exits off of 401, running north and south, to 401 Highway and also all service stations on 401 Highway proper within the vicinity of Trenton.

At several service stations, the owners were not present, however, after conversation with the employees, they indicated that they would bring this to their employers' attention and that on the 22nd of January, on our return voyage, any information which they may have would be obtained at that time.

It should be noted that no Supertest Stations were observed along the 401 Highway itself anywhere within a 4 or 5 mile distance of Trenton, Ontario."

Huneault and Norton continued to Richmond Hill where they interviewed Ms. Chartrand. They returned to Ottawa the next day. Huneault wrote in his report:

"On the morning of January 22nd, a telephone call was placed by Detective Nadori to Lieut. Lowry, the call being made from Markham, Ontario, as a result of a previous request from Lieut. Lowry to ascertain from Lieut. McCombie information regarding service stations in the Trenton area in reference to a radio being exchanged allegedly exchanged (sic) by the accused previously mentioned. Lieut. McCombie was unavailable on our departure, attending the Canadian Police College. As a result of the telephone call, we were advised by Lieut. Lowry that the service station in question was located on the south side of Highway 401, near Trenton, Ontario.

As a result, we proceeded to that general area, at which time we checked both exits from Highway 401, the first exit being the Highway 33 exchange, this exit being checked for a distance of approx. two miles on either side running north and south and also the Glen Miller Road was checked thoroughly in a northerly direction with no results whatsoever. In the southerly direction on the Glen Miller Road, a complete check was made of all service stations right from Highway 401 directly into and including Trenton, Ontario. During the checks of these service stations, all proprietors of Supertest Stations were interviewed. At this time we were advised by the owners that they had been in business since approx. 1964-1965 and had no knowledge whatsoever of a radio being exchanged as previously mentioned. At one particular Supertest Station, we were advised that it was closed down, however, the former proprietor was operating a Fina Station in Trenton proper and he was also interviewed, however, this met with negative results.

Information received in the telephone call from Lieut. Lowry indicated that the service station was just off of one of the exits right near Trenton, however, upon checking that particular location, numerous persons were interviewed and it was learned that there were no service station[s] of that description had ever been at that location to their knowledge and that these people had been around for a considerable length of time.

We returned to Ottawa at approx. 1945 hours on January 22nd and completed duty." (emphasis added)

Huneault's report suggests that Lt. Lowry's knowledge of the location of the service station came from a conversation he had had, at Huneault's request, with McCombie. This provides important

corroboration that McCombie found the station in 1967. This, as far as the existing records show, is the last mention of the Trenton alibi in the police reports. Thus, despite the verification by McCombie of the existence of the service station in 1967, nothing further was said or done about it by the 1972 investigators after January 22. Why, for example, did they not discuss it with McCombie who would presumably have told them that he had possession of the car radio?

Investigation Report of Huneault, Jan.13/72, Record , Vol, 2, Tab 98
Investigation Report of Huneault, Jan.23/72, Record, Vol. 2, Tab 108

266. There can be little doubt that Mr. Lindsay had all these investigation reports. It explains his entry on his “Additional witnesses” list for “Service Station operators near Trenton”. He wanted to be ready to refute the defence if it called evidence to suggest that Phillion was in Trenton at the time of the homicide by calling those operators interviewed on January 22, 1972 by Huneault and Nadori. The entry also suggests that Mr. Lindsay had decided not to disclose McCombie’s success in 1967 in locating the actual service station operator with whom Phillion had dealt.

“Re Trial Additional witnesses”, Record, Vol. 12, Tab 4

Conclusion

267. It is a necessary conclusion that none of these police reports were disclosed to the defence. Each time the issue of what Mr. Phillion had told the police of his whereabouts came up at the preliminary hearing or trial, there was extensive argument as to its admissibility. Mr. Cogan tried his utmost to have the statements admitted but never alluded to any knowledge of the police confirmation of the Trenton alibi. He surely would have in his submissions if he had known of it.

In fact, Huneault's evidence at the preliminary hearing that he had looked for, but been unable to find, a service station in Trenton was positively misleading for Mr. Cogan. As well, Mr. Cogan would have sought to do something with the police confirmation of the alibi if he had known of it. His defence, after all, was an assertion of innocence – subjecting his client to a polygraph examination almost certainly reflected his belief that Mr. Phillion had nothing to do with the homicide. His defence was decidedly not a defence based on the simple assertion that the Crown had failed to prove its case. The defence, therefore, only knew from the January 12, 1972 question posed by Norton to Phillion, “Do you remember selling the car radio in Trenton?”, and Norton's explanation that he asked this question as a result of his further review of the main file, that the selling of a car radio in Trenton appeared to be of some significance to the police in their investigation. Unfortunately, Mr. Cogan had a highly unreliable historian for a client. As can be seen from the various police reports and evidence, Phillion gave a variety of explanations for his whereabouts on the day of the murder when he was not confessing to it. He variously was reported to have said that he was in Trenton, New Liskeard, Toronto, Arnprior, Montreal and Kingston, or was travelling between one or more of these destinations.¹⁰⁶ Mr. Phillion's numerous letters that he has written since his conviction are equally confusing and irreconcilable.

268. In these circumstances, it was essential for Mr. Cogan to know the results of the police investigation of Mr. Phillion's various claims; even more so when the police confirmed the truth of one of them close to the time of the events and, as a result, eliminated him as a suspect more than four years before his arrest. It will be submitted that Mr. Lindsay read the April 12, 1968

¹⁰⁶ Phillion's different statements as to his whereabouts are listed *infra* paragraph 383.

investigation reports, and had copies of them in his file. It is notable that each and every time Mr. Cogan sought to lead evidence of his client's exculpatory statements, Mr. Lindsay objected. Thus, he objected at the preliminary hearing when Mr. Cogan sought to lead evidence of the January 12, 1972 conversation with Norton; he objected when Mr. Cogan sought to cross-examine McCombie on his conversation with Phillion on August 13, 1967; and he objected when he sought to cross-examine Huneault regarding Phillion's claims to have been elsewhere at the time of the offence. Mr. Lindsay once more objected on the *voir dire* at the trial when Mr. Cogan again sought to lead evidence of the June 12, 1972 conversation with Norton, though he later relented. These interventions by Mr. Lindsay were all made in a forum other than before the trier of fact. There was no possible prejudice to the Crown if the evidence was heard by Beaulne J. at the preliminary hearing, or Van Camp J. on the *voir dire* at trial, other than that the defence might acquire some of the information that the Crown had elected not to disclose. Mr. Lindsay also made a remark at the preliminary hearing which suggested that he knew more than he was prepared to disclose to the defence. As has been explained, during argument at the preliminary hearing on the January 12 Norton conversation, Mr. Lindsay said:

"I do not wish to tender the statement that Mr. Cogan's examining Detective Sergeant Norton about and I have reasons for it which we may disclose after the preliminary inquiry is over."

No further reference to this comment appears anywhere else in the transcripts.

2. THE UNDISCLOSED TICKET FOR HIGHWAY TRAFFIC OFFENCES RECEIVED BY MR. PHILLION OUTSIDE OTTAWA ON AUGUST 8, 1967

Introduction

269. Mr. Phillion made numerous conflicting and contradictory statements as to his whereabouts on the day of Mr. Roy's murder and, as part of his January 11 confession, told the police that, after the murder, he drove to Trenton, and the next day drove to Toronto and on to New Liskeard, where he was subsequently arrested and returned to Ottawa. The police reports disclose that, on August 8, 1967, Mr. Phillion received a traffic ticket which, when viewed in the perspective of Mr Phillion's various statements, helps establish that he left Ottawa before Mr. Roy's murder and dovetails with the police confirmation of the Trenton alibi.

270. In the days surrounding August 9, 1967, Phillion was stopped by police a number of times.

- On Thursday, August 3, 1967, P.C. Austin of the Schreiber O.P.P. Detachment stopped Phillion in North Bay as he was driving his Ford convertible. Gail Brazeau was a passenger in the vehicle at the time. Phillion was allowed to proceed and was not ticketed.
- On Tuesday, August 8, 1967, at 6:00 p.m., P.C. Liboiron of the Ottawa O.P.P. Detachment stopped Phillion as he was driving his Ford convertible on Highway 17, the "Britannia Highway", west of Ottawa, in the direction of Arnprior. He gave Phillion a ticket for having failed to transfer the vehicle ownership into his name.
- On Friday, August 11, 1967, at 8:50 p.m., P.C. Shortt of the New Liskeard police stopped Phillion as he was driving his Ford convertible in New Liskeard and ticketed him for driving

without insurance, and operating an unsafe vehicle. Because of the unsafe condition of the vehicle, it was seized by the police and stored behind the police station.

New Liskeard Police Department Report, Jan, 17/72, Record, Vol. 2, Tab 102
Investigation Reports from Nadori, Jan. 13, 17, and 19/72, Record, Vol. 2, Tabs 99, 103, 106

(a) Statements Made by Mr. Phillion to Police Officers about
Driving Along Highway 17 Towards Arnprior
and Being Stopped by the Police *En Route*

271. On January 11, 1972, Mr. Phillion first mentioned the ticket, that he said he had received *after* the murder on August 9, 1967, to Detectives Norton, Huneault and Nadori as they returned to the police station from their first trip to 275 Friel Street. In his January 12, 1972 investigation report, Norton reported that when they were at the Minto Bridges, Phillion

“... further informed us that shortly after this he left town and drove out Highway 17 and then somewhere east of Arnprior went to a Shell Service Station and ponded [*sic*] a suitcase for some gas as he was out of funds.

He further stated that the Ontario Provincial Police stopped him about five minutes or 1 mile from the station and suggested he was speeding and also mentioned that he was driving without insurance and had an unsafe car. He stated that he never paid the fine for this and he was allowed to go on his way.”

In his evidence on the *voir dire* at Phillion’s trial, Norton added that Phillion told him that, after he received the ticket, he drove to Toronto via Trenton, and then continued to New Liskeard.

Investigation Report of Norton dated Jan.12/72, Record, Vol. 2, Tab 97
Evidence of Norton, *voir dire*, Vol. 2, 38/10-45

272. Detective Huneault also prepared an investigation report on January 11, 1972. He reported as follows:

“On the return trip from [our first visit to] Friel St. at that time [Phillion] told us the story of being stopped by the police on the 9th of Aug. 1967 on his way to Trenton, that he had been ticketed by the OPP just east of Arnprior for having unsafe tires and no insurance on his vehicle. He also indicated at that time that he had stopped at a Shell Service Station near Arnprior, and had sold the suitcase which he had with him for the purchase of gasoline.”

Huneault did not refer to this conversation in his evidence at the preliminary hearing or at trial.

Investigation Report of Huneault dated Jan.11/72, Record, Vol. 2, Tab 92

273. It should be noted that Highway 17 runs due east from Ottawa to Arnprior, and beyond. Arnprior is about 70 kilometres from Ottawa. Highway 17 would have been a legitimate route to take from Ottawa in order to go to New Liskeard.

Map showing Ottawa, Arnprior, Glasgow Station, Highway 17 and Trenton, each circled in red

(b) The 1972 Investigative Follow-Up on the Traffic Ticket Received by Mr. Phillion on August 8, 1967 and Information that He was at a Gas Station Near Glasgow on the Same Day

274. In 1972, after Mr. Phillion's arrest, the police officers now involved in Mr. Phillion's case followed up on his claim that he had been pulled over and ticketed for traffic offences on August 9, 1967 after he left the scene of the homicide.¹⁰⁷

275. Detective Huneault prepared an Investigation Report at 11:00 a.m. on January 13, 1972. He reported as follows:

“On the morning of January 12, 1972, through Detective O’Driscoll’s office a check was made with the OPP, to check their records in reference to previous information received that the accused PHILLION had been charged with traffic offences on Highway 17, on the day *prior to* this occurrence, and we were advised that subsequently by OPP staff that they had checked their records thoroughly, and that this could not be substantiated as no records whatsoever were found to indicate this was a fact.” (emphasis added)

He further reported that he and Detective Nadori had prepared a list of further investigative steps to be taken which included the following:

“Item 2, attempt to identify the police officer who stopped PHILLION, for speeding on Highway 17, east of Ottawa,¹⁰⁸ sometime *after* the murder, and at 22:00 hrs., on the date in question. PHILLION alleged that this did occur and made reference to it on August the 9, 1967, while in conversation with Paul BARBE, of 246 York St.”¹⁰⁹ (emphasis added)

¹⁰⁷ There is reference in McCombie’s September 15, 1967 investigation report that there was, at that time, a traffic warrant out for Phillion’s arrest but that it would only be executed if he returned to Ottawa. The traffic offence is not further defined in the report. Investigation Report of McCombie, Sept. 15/67, Record, Vol. 2, Tab 40

¹⁰⁸ The suggestion that he had been stopped “east” of Ottawa is presumably a misprint. All other references to the ticket refer to him having been stopped west of Ottawa. It is unknown where the time of 22:00 for the stop came from.

¹⁰⁹ Phillion’s conversation with Mr. Barbe in this regard is discussed in detail *infra* at paragraph 292.

Investigation Report of Huneault dated Jan.13/72, Record, Vol. 2, Tab 98

276. This investigation report of Huneault raises a number of questions. On the first page of the report, Huneault advises that on January 12, 1972 he had inquiries made of the OPP to check their records “in reference to previous information received that the accused Phillion had been charged with traffic offence on Highway 17 *on the day prior to this occurrence...*”. It is unknown what the “previous information” was that suggested that Phillion had received the ticket the day *before* the murder. It contradicted what Huneault and Norton had recorded Phillion as telling them on January 11, 1972. Presumably, the “previous information” either related back to investigation reports in the main investigative file from 1967 (there is not, however, any report from 1967 which makes reference to Phillion receiving a ticket on August 8), or Phillion told Norton that he had been ticketed the day before the murder when they spoke at the police station at 7:30 a.m. on January 12, 1972 but their discussion formed a part of the “doubled-over” section of the tape (see paragraph 259 *supra*). Alternatively, Huneault may have run across the traffic warrant that had been issued for Phillion’s arrest in 1967 as a result of the Highway 17 ticket, as the warrant would have identified the offence date as August 8, 1967. Then, on the third page of the same report, Huneault listed as one of the investigative steps to be undertaken the need to identify the officer who stopped Phillion for speeding on Highway 17 “sometime *after* the murder”. The obvious inconsistency in the report as to which day Phillion was ticketed is intriguing but receives no commentary in Huneault’s report.

Investigation report of Huneault, Jan. 13/72, Record, Vol. 2, Tab 98
Investigation report of McCombie, Sept. 15/67, Record, Vol. 2, Tab 40

Detective Nadori's discovery on January 13, 1972 that P.C. Liboiron had issued a ticket to Mr. Phillion on August 8, 1967

277. On the same day, January 13, 1972, Detective Nadori prepared an investigation report of his own. His report included the following:

“Also on this date while attempting to identify the police force by whom Phillion had been stopped for a traffic offense *on or about* August 9, 1967. The writer had been in conversation with Corp. Beard of the Ontario Provincial Police, Ottawa Detachment who informed the writer that his detachment holds a warrant of committal for the arrest of Romeo Phillion *pertaining to an offense which occurred on August 8, 1967*. The warrant had been obtained on the information of Const. Lee Liboiron of the above detachment, home phone 828 0423. *At approx. 2350 hours the writer was in conversation with Const. Liboiron who informed the writer that on August 8, 1967, a Tuesday, at 1800 hours while on Highway 17 at the Arnprior County line he had occasion to stop a 1958 Ford convertible, bearing 1967 registration 350 826. The auto was driven by Romeo Phillion, driving permit no. 23462-66755-990429 DOB 29-4-39 of 106 Sweetland St. Ottawa Apt 5 who was also the owner of the vehicle concerned.* The violation ticket (no. 706749) of which the above officer quoted the earlier information also contains items to the effect that the violator is a male, he is single and that he is unemployed. Const. Liboiron stated that he has stopped the above auto because he knew the driver by sight as a criminal and that subsequent to checking the ownership of the vehicle he found that same has not been transferred from the name of the previous owner, subsequent to which he issued the above ticket for the violation of section 9 (1) paragraph E of the HTA, the ticket being returnable on Sept 18, 1967. In view of that Phillion did not show up in court on the above mentioned date, he was tried in absentia and when he could not be reached for payment of the above fine the earlier indicated warrant no *PO426-68* had been issued for his arrest. Const. Liboiron also stated that he has submitted a known criminal card regarding this incident which is indicated in his own personal diary. *The copies of the above document will be obtained by the writer.*”¹¹⁰ (emphasis added)

Phillion being stopped on Tuesday, August 8 was consistent with part of what Gail Brazeau had told the New Liskeard police in her statutory declaration on April 4, 1968. She said:

“On Tuesday Romeo wanted to go to Toronto but I didn’t want to go and he was quite mad because I wouldn’t go with him. I told him if he didn’t like it he could take off so he took off about 2:00 pm or 3:00 pm that afternoon and I stayed at my mothers.

¹¹⁰ There was no copy of the traffic warrant, nor the ticket itself, in the archives.

.....

Before Romeo had left that afternoon my mother had given him a dollar for cigarettes and coffee as he was broke.”

There is good reason to believe that Phillion was actually stopped on Highway 17 near the Britannia Road, which is what he told the Barbes later that day (*infra* paragraphs 305 to 306). Britannia Road is on the outskirts of Ottawa. It is not clear what P.C. Liboiron meant by saying he stopped Mr. Phillion at the “Arnprior County Line”, but he may have meant the town line separating Ottawa from Nepean which was in the vicinity of Britannia Road.

Investigation Report of Nadori dated Jan.13/72, Record, Vol. 2, Tab 99
Statutory Declaration of Gail Brazeau, Apr. 4/68, Record, Vol. 2, Tab 73

278. P.C. Liboiron was not called as a witness at any proceedings.¹¹¹ In the witness list at the front of the Crown brief, P.C. Liboiron’s evidence is summarized sparingly as

“places accused in Ottawa area on August 8th, 1967”.

There is a willsay for him in the Crown brief retrieved from the archives. It reads as follows:

“This witness will state that he is a member of the Ontario Provincial Police, and that on August 8th, 1967, at about 1800 hrs. while on patrol on Highway 17, he had occasion to stop a 1958 Ford convertible, bearing Ontario 1967 registration, 350-826. The vehicle was being driven at that time by Romeo Phillion, driver’s permit # P3462-66753-990429, date of birth, 29-04-39, address 106 Sweetland Avenue, Ottawa, apt. #5, and he will state that his person was also the owner of the vehicle.

Will state that he issued a violation ticket # 706749, under Section 9 (1)(e) of the Highway Traffic Act, and the ticket made returnable September 18th, 1967.

¹¹¹ Liboiron was apparently subpoenaed for the Grand Jury hearing on September 5, 1972. As regards the preliminary hearing, he was on a list entitled “Not Required Preliminary”. He was also subpoenaed for the trial.

“Romeo Phillion - Witnesses - Grand Jury”, Record, Vol. 12, Tab 4
“Not Required Preliminary”, Record, Vol. 12, Tab 4

Will state that he knew the accused Phillion, as a known criminal, by sight, and will state that the accused, Phillion, failed to appear on September 18th, 1967, as a result his case was tried in absentia and when he could not be reached for payment, a Warrant was issued for his arrest, warrant # P0426-68.

This officer will also indicate that he recorded this incident in his own personal diary and submitted a known criminal card at that time. He will state that the accused was travelling west bound on Highway 17 at that time.”

A handwritten chart was found in the archives. The handwriting appears to be that of Mr. Lindsay.

It sets out a calendar for the first nineteen days of August and marks events that occurred on each day.

Mr. Lindsay's handwritten calendar

Thus, Mr. Lindsay's entry for the evening of August 8 reads:

"6:30 p.m. – Lee stops R. – ticket."

Mr. Cogan knew of P.C. Liboiron's existence because his name was typed on the back of the indictment. However, we do not believe he knew of his potential evidence, or saw his willsay, (see Appendix 1, paragraphs 57 to 59) which was essential knowledge for Mr. Phillion's full answer and defence.

Willsay of Liboiron, Crown Brief, Record, Vol. 13, Tab 30
List of witnesses, Record, Vol. 13, Tab 2
Handwritten Calendar, Record, Vol. 12, Tab 12

279. In the same report of January 13, Nadori wrote that he was told by P.C. Close of the Renfrew Detachment, who checked their Highway Traffic Act book for *August 9, 1967*, that there was no entry for Romeo Phillion on that date. Later that evening, Nadori received a telex from the Renfrew O.P.P. Detachment. They advised that Phillion had *not* been stopped by any member of their Detachment on August 9, 1967. The O.P.P. records did, however, reveal that he had been stopped on August 3, 1967 while driving his red convertible. "An unknown female" was in the car with him. The location of the stop was not provided in the report but it was, in fact, in the North Bay area.

Investigation Report of Nadori dated Jan.13/72, Record, Vol. 2, Tab 99
Report of P.C. Austin, North Bay Police, Record, Vol. 2, Tab 21

*Information that Mr. Phillion exchanged a suitcase
for gasoline at Young's Shell Station on August 8, 1967*

280. On January 11, 1972, after the first visit to Friel Street in an attempt to re-enact the crime, Mr. Phillion told Detective Sgt. Norton that after the murder he left town driving on Highway 17 and

“...pawned the suitcase for gasoline at a Shell service station at the Ottawa side of the village or town of Arnprior”, he further stated that the OPP stopped him about five minutes – one mile ... from this gas station and he stated that the officer charged him with speeding, told him he had unsafe tires and allowed him to go after serving notice on him and indicated that he went to Toronto via Trenton and further he travelled on to New Liskeard, Ontario....”

In his January 11, 1972 investigation report, Detective Huneault recorded the same conversation:

“On the return trip from Friel St. at that time he told us the story of being stopped by the police on the 9th of Aug. 1967 on his way to Trenton, that he had been ticketed by the OPP just east of Arnprior for having unsafe tires and no insurance on his vehicle. He also indicated at that time that he had stopped at a Shell Service Station near Arnprior and had sold the suitcase which he had with him for the purchase of gasoline.”

Investigation Report of Huneault, Jan. 11/72, Record, Vol. 2, Tab 92

Investigation Report of Norton, Jan. 12/72, Record, Vol. 2, Tab 97

281. The next day, January 12, 1972, Detectives Huneault and Nadori prepared his “to do” list which Huneault incorporated into his January 13, 1972 investigation report. It included the following item:

“Item 3, attempt to identify a service station on Highway 17, according to PHILLION, he has traded a suitcase for gasoline during the afternoon of August the 9, 1967.

.....

Regarding Item 3, new information has been received by D/Sgt. Norton, that a service station operator in the area of New Glasgow, Ont., did in fact during the summer of 1967, did receive a suitcase containing Doctor’s equipment as part payment for gas, from a male person answering the description of the accused, and that this person still had this suitcase in his possession.” (emphasis added)

Investigation Report of Huneault, Jan. 13/72, Record, Vol. 2, Tab 98

282. On January 13, 1972, Detectives Huneault and Nadori went to check out Mr. Phillion’s claim about pawning a suitcase after the murder. Detective Nadori reported:

“Also on this date information had been received by Detective Sgt. O’Driscoll of the intelligence section from the Renfrew Detachment of the OPP from a Const. Agathe *that they have located Frazer’s Texaco in New Glasgow Station where a male person had ponded [sic] for gasoline a suitcase and its contents during the summer of 1967.* We departed from Ottawa approx. 1600 hours and arrived to the above mentioned gas station

at 1715 hours due to extremely bad weather and road conditions. We were in conversation with Mr. Douglas Frazer, the owner of the above mentioned gas station, address RR #4 Arnprior, phone 623 5778. The above person informed us that he has no knowledge whatsoever regarding the suitcase involved. As a result of this the writer has placed a long distance telephone call to the Renfrew Detachment of the OPP (charging same to number of Ottawa Police) and subsequent to conversation with Const. Robert Close we proceeded to the above detachment arriving there approx. at 1830 hours. *Const. Close informed us that the service station which we desired was Young's Shell Service station of RR#2 Arnprior approx. 10 miles west of the above town on Highway 17.*

.....

At 1920 hours we arrived to Young's Shell service station at the above address and were in conversation with the proprietor's wife Mrs. Florida Young, phone 623 5731, the owner being Mr. John Young of the same address. The lady concerned informed us that during the summer of 1967, a male customer called at their service station intending to purchase gas. The male person did not have any money and in return for \$2.00 worth of gas he offered to exchange a brown coloured flight bag make of nylon with one handle broken and a broken zipper. It was subsequently discovered that the flight bag contained soiled underwear, a shaving kit, one white short sleeved shirt with brown trimmings on the sleeve and on the neck and two surgical belts which would be worn by persons released from hospitals with stomach or back operations.¹¹² The male person apparently stated that he had just been released from the hospital and that he was on his way to Ottawa and that when he had the money he would return to the service station and retrieve his belongings. The service station operator and his wife has not seen the above person since. In further conversation with Mrs. Young she stated that she was not sure regarding the year in which she and her husband obtained the above bag and that she has thrown the bag and its contents into the garbage since.¹¹³ She states that the person is, if she recalls it right, was about thirty years of age and he was small and dark. She states that the only item that she has retained from the bag was the earlier indicated shirt which she gave to her nephew of the same address, Mr. Ernest Young. (emphasis added)

¹¹² The surgical belts may have belonged to Romeo's mother. In mid-July, 1967, she had been treated for cancer at St. Margaret's Hospital in Toronto. After her stay, Romeo and Gail Brazeau had returned with her to her home in North Bay. Perhaps Mrs. Phillion left the surgical belts in Romeo's car at some point.

Investigation report of Nadori, Jan. 25/72, Record, Vol. 2, Tab 109, pp. 2, 5

¹¹³ Huneault prepared a report the next day, January 14, 1972, which began as follows:

“At approx. 2100 hours on Jan. 13, upon return from the Renfrew area where Detective Nadori and myself was checking a suitcase which may or may not have been involved in this occurrence, an investigation report being submitted on that by Detective Nadori ...”.

In this passage, Huneault seems to be confirming that he and Nadori actually retrieved the suitcase from the Shell Station.

Investigation Report of Huneault, Jan. 14/72, Record, Vol.2, Tab 101

Thus, to a considerable extent, Romeo Phillion's claims to Norton, Huneault and Nadori on January 11, 1972 were confirmed by the owner of Young's Shell Service Station, except that they could not provide a date for the event. As well, Young's Station was not, as Phillion claimed, east of Arnprior, but was west of Arnprior, on Highway 17. However, Mr. Phillion, while claiming that it had happened as he fled Ottawa after the murder, also told Norton, Huneault and Nadori that it had happened on the day he received the traffic ticket, which it is now known was the day before the murder. Confirmation of Phillion's memory about the exchange at the gas station, therefore, adds considerable weight to our belief that Phillion left Ottawa twice – once on August 8 in the afternoon or early evening, and a second time late that night or early the following morning (*infra*).

Investigation Report of Nadori dated Jan.13/72, Record, Vol. 2, Tab 99
See also Investigation Report of Nadori dated Jan.17/72, Record, Vol. 2, Tab 103

Inferences that can be drawn from the information now available

283. From this information, it therefore became known to the police that Phillion had travelled at 6:00 p.m. on August 8, 1967, the day *before* the murder, on Highway 17 in the direction of Arnprior, and had been stopped on the outskirts of Ottawa by P.C. Liboiron of the O.P.P. who ticketed him for failing to transfer the registration of his vehicle into his name. Attempts by Nadori to establish that Phillion had been stopped anywhere on the following day, August 9, proved to be fruitless. The police also knew that Phillion's claim to Norton and Huneault on January 11, 1972 that he had run out of gas on Highway 17 (on the same day that he had been ticketed) and pawned his suitcase for gasoline at a Shell service station on the same trip was corroborated to the extent that they now knew an event like this had occurred some years earlier in the vicinity of Arnprior. Not

surprisingly, Mrs. Young of Young's Shell Service Station had not been able to tell them the date that this had occurred in 1967, four and a half years earlier. There were some things stated by Phillion that had not proved to be entirely consistent with the new information acquired by Huneault and Nadori.

- According to the O.P.P. information, Phillion had been ticketed by Liboiron on August 8 for not transferring his registration. Phillion had recalled in his conversation of January 11, 1972 with Nadori and Norton that he had been stopped for speeding and ticketed for driving without insurance and having unsafe tires. Phillion had likely confused the occasion when he was stopped by P.C. Liboiron on August 8 on Highway 17 with the time when he was stopped on August 11 by the New Liskeard police. On the latter occasion, he was ticketed for driving without insurance, and having an unsafe vehicle.
- Young's Shell Service Station was reported by Nadori to be ten miles west of Arnprior. Phillion was reported to have told Norton and Huneault in 1972 that the Shell station was "somewhere east" of Arnprior. It was, in fact, west of Arnprior. P.C. Brown of the New Liskeard Police Department recalled Phillion telling him on August 13, 1967 that the Shell station was south of Arnprior.

Investigation Report of Nadori, Jan. 17/92, Vol. 2, Tab 103

284. In his undisclosed investigation report of January 17, 1972, Detective Nadori related the conversation that he had with P.C. Brown of the New Liskeard police wherein Brown told him that he remembered Phillion telling him, after his arrest in New Liskeard in August, 1967, that he had been stopped by the OPP on August 9. The veracity of Brown's claims have already been questioned in this brief (*supra* paragraph 261).

Investigation Report of Nadori dated Jan. 17/72, Record, Vol. 2, Tab 103
Evidence of Brown, Preliminary Hearing, Vol. 5, 426/45, 429/10

285. On January 25, 1972, Huneault and Nadori spoke to Romeo Phillion's mother and asked her whether she had relatives in the Arnprior area. They were trying to ascertain whether this might have been the reason that Phillion had driven out there on August 8, 1967. Nadori wrote in his investigation report of that date:

“During conversation Mrs. Phillion stated that she does not recall of having any relatives residing in the area of Perth or Arnprior. It may be noted that the above inquiry had been made in view of that on August the 8th 1967 Romeo Phillion had been observed proceeding west on Highway #17 from Ottawa and that either on that day or the following day he returned here and we are presently checking out the possibility that he may have went to visit a relative in the Perth area at the time. This presumption had been arrived to in view of the fact that on January the 5th, 1972 while speaking to a Mr. RICHARDSON, Romeo Phillion mentioned that he had a Aunt residing just east of Perth.”¹¹⁴

It is submitted that an alternative explanation for Phillion's driving that day was that he left Ottawa with the intention of driving to New Liskeard, realized at Young's Station he could not afford the gas for the trip, and returned to Ottawa in the hope that he could find enough money for the trip. His return to Ottawa was corroborated by Gail Brazeau. In her April 4, 1968 statutory declaration, after stating that Romeo “took off about 2:00 or 3:00 p.m. that afternoon”, she continued:

“That night I was sitting out in front on my mother's place and he drove by in the convertible 6 or 7 times but never stopped or talked to me.”

Investigation Report of Nadori dated Jan.25/72, Record, Vol. 2, Tab 109
Statutory Declaration of Gail Brazeau, Apr. 4/68, Record, Vol. 2, Tab 73

Post-conviction interviews of Mr. Cogan regarding the August 8 ticket

286. On April 11, 1995, Jack Parish, as part of his retainer by Mr. Crane, spoke to Mr. Cogan and

¹¹⁴ There is no other reference to Mr. Richardson in the case. There is no police report that refers to this conversation that Phillion purportedly had with him.

asked him about the traffic ticket. Mr. Cogan told him that

“...he had a vague recollection of a traffic ticket being discussed, but thought that it didn’t jibe with the alibi in terms of dates, or possibly that it did nothing to prove that Mr. Phillion was indeed driving the car at the time.”

Douglas Crane reported on a telephone conversation that he had with Mr. Cogan on November 29,

1995:

“[Mr. Cogan] did recall some discussion of traffic tickets but dates on the tickets did not provide an alibi for Aug. 9. As well as tickets would be issued to the owner then they wouldn’t establish who was driving anyway.”

Parish interviews Cogan, Apr. 11/95, Record, Vol. 15, Tab 12
Crane conversation with Cogan, Nov. 29/95, Record, Vol. 15, Tab 13

287. On June 25, 1996, Michael Dale of the Criminal Conviction Review Group issued a draft investigation brief in response to Romeo Phillion’s then section 690 application. One of Phillion’s claims was that the traffic tickets issued in New Liskeard could prove that he was not in Ottawa at the time of the murder.¹¹⁵ Mr. Dale provided his analysis under the heading

“The submission that traffic tickets issued to the applicant in New Liskeard, Ontario, and other evidence of his activities in August of 1967, when Mr. Roy was murdered, provide evidence of an alibi which, had such evidence been before the Jury, would have altered the verdict.”

Mr. Dale reported that he spoke to Mr. Cogan in this regard:

“As to the New Liskeard traffic tickets which the applicant alleges were shown to Detective McCombie and Mr. Cogan to establish an alibi defence for August 1967, Mr. Cogan, when interviewed by departmental counsel on April 11, 1995, advised that he knew of no exculpatory evidence in the police file or anywhere else that he had failed to use at trial. In

¹¹⁵ This is an excellent example of Phillion’s confusion over times, places and events. He kept insisting to the Department of Justice that he received the ticket in *New Liskeard* on August 8, 1967. In fact, he received a ticket *outside Ottawa* on August 8, and a ticket in New Liskeard on August 11.

a subsequent interview with departmental counsel on November 29, 1995, Mr. Cogan advised that he had not even met the applicant until 1972, when he was retained. Furthermore, he had never seen any of the tickets alluded to by the applicant. *He recalls that he had been advised by police that none of the traffic tickets were for the day of the murder, but days later. These tickets were not conclusive, in his view, because the applicant could have had the time to drive from Ottawa to New Liskeard by the time they were issued. As well, none of the tickets would have established that the applicant was the operator of the vehicle, as they were issued to the registered owner.* Moreover, Mr. Cogan was never advised by his client of any alibi witnesses he wanted to be called in his defence.” (emphasis added)

Further on in the report, Mr. Dale stated that Mr. Cogan was not

“... advised of the names of any alibi witnesses to call on the applicant’s belief, nor of anyone who could have been Mr. Roy’s killer. *He vaguely recalls a traffic ticket but believes it may not have conformed to the dates given for an alibi or may not have proven the applicant was actually driving the car at the time of the ticket.*” (emphasis added)

Mr. Cogan, therefore, neither saw nor knew of the existence of the actual August 8 ticket.

Knowledge of this ticket was a vital component of Phillion’s defence.

Draft Investigation Brief, Record, Vol. 15, Tab 15

288. On July 28, 1992, Jack Parish of *Summit Investigation Services* had interviewed Sgt. Jelly of the New Liskeard Police at their headquarters. Sgt. Jelly produced the ticket given to Phillion on August 11, 1967 by P.C. Shortt, and also showed him a copy of P.C. Brown’s police report entitled “*Investigations into one Romeo Phillion*” which contained entries from August 11, 1967 to April 4, 1968. Mr. Dale referred in his report to Jack Parish’s meeting with Sgt. Jelly of the New Liskeard police and wrote:

“Mr. Parish found a complete sequence of tickets issued in August, 1967 and apparently all tickets issued to the applicant have been accounted for. He notes that the police department had a policy in 1967 that required every occurrence to be reported, including the issuance of traffic citations. Despite this report from his own private investigator, the applicant insists that the police have fabricated a traffic ticket with the wrong date but proper issuance number, so as to deprive him of an alibi.”

Implicit in this passage is Mr. Dale's belief that Phillion's claims should be entirely discounted. Subsequent events have proved him to be quite wrong in this assessment.

Draft Investigation Brief, Record, Vol. 15, Tab 15

Conclusion

289. Once the 1972 investigators realized that Phillion had been ticketed on Highway 17 on August 8, the day before the murder, they should have realized that Phillion's claim that he drove towards Arnprior after the murder and received a ticket was wrong, and called the reliability of his confession into question. As will now be seen, they should also have realized that his ticketing on August 8, not August 9, had considerable relevance to the trial evidence of Mrs. Barbe, and the 1972 memories of the Barbés, which placed Phillion in Ottawa on the evening of the murder.

3. THE UNDISCLOSED STATEMENTS MADE BY MR. AND MRS. BARBE IN 1967

Introduction

290. By 1972, the evidence of the Barbés supported the Crown theory that Mr. Phillion murdered Mr. Roy since the Barbés were able to place him in Ottawa both before *and after* the murder. The defence had no idea that their memories had materially changed since 1967. In 1967, they gave statements suggesting that they last saw Phillion the evening *before* the murder, and that he was planning to leave Ottawa that night or the next morning.

(a) The Materials Regarding the Barbes that were Disclosed

291. Denise Barbe was called as a Crown witness at Mr. Phillion's trial. She made two highly material claims. First, in her willsay, she claimed as follows:

“This witness will state that on August 9th, 1967, she was employed at Department of National Revenue, Taxation, 444 Sussex Drive, that she walked home from work, terminating work at 4:00 p.m. and the walk home would take her approximately 15 minutes and that is when she saw Phillion, driving down York Street, would be about 4.15 p.m. in the afternoon of August 9th, 1967.”

Despite placing Phillion in the vicinity of the murder within one and a half hours of the murder, for some reason, Mrs. Barbe was not asked about this sighting at the trial or at the preliminary hearing.

Willsay of Denise Barbe, Record, Vol. 13, Tab 29

292. Second, Mrs. Barbe testified that on Wednesday, August 9, she went to play bingo as was her custom on Wednesdays. On her return home, sometime after 10:15 p.m., she saw Romeo Phillion. Shortly thereafter, he spoke to her husband, telling him that he was going to return home to New Liskeard, and wanting to sell his car. Mrs. Barbe's evidence, if correct, meant that Phillion was still in Ottawa after the homicide. Paul Barbe, Denise Barbe's husband, was not called by the Crown (or defence) at Phillion's trial. This was despite the Crown having told the jury in his opening address:

“I expect you will also hear that on an evening in the middle of the week, the second week of August, Mrs. Brazeau looked out of her window and saw Mr. Phillion talking to the neighbours next door, Mr. And Mrs. Barbe, *and I expect you will hear from those two witnesses that on Wednesday, August 9th, 1967, the very day that this matter occurred, the accused was talking to Mr. Barbe and was asking him if he knew anyone who wanted to buy his red convertible car. The accused wished to borrow some money for gas so that he could leave town, I expect you will hear, and that they did not see the accused man after that.*”
(emphasis added)

Mr. Barbe had, however, testified at the preliminary hearing. In his evidence, he had recalled a similar conversation with Phillion on a Wednesday evening in 1967, and that his wife joined them when she returned from playing bingo. She used to always go to bingo, he testified, on Wednesdays, but he was unable to affix a date to this particular Wednesday. Gail Brazeau, who only testified at the preliminary hearing, and her mother who testified at trial, provided some support for Mrs. Barbe's testimony but neither could fix the day, or date, that Phillion was last seen in Ottawa.

Crown Opening Address, Vol. 1, 111/5-15
 Evidence of Paul Barbe, Preliminary Hearing, Vol. 4, 327/20 to 330/50, 331/40-50
 Evidence of Denise Barbe, Vol. 5, 934/30 to 942/40
 See paragraphs 79 to 81, *supra*

293. In his closing address, the Crown relied on the evidence of Mrs. Barbe. He said:

“And ... gentlemen, as you go through the confession, you will notice that a great deal of it is supported by other evidence. For instance, a large part of it is supported by something that you heard from Neil Miller; a large part of it is confirmed by Mrs. Barbe and Constable Bolger, who found him in New Liskeard, Ontario, and that is where the accused said he went around eleven-thirty that night, and Mrs. Barbe, you will remember, mentioned that she saw him around eleven-thirty¹¹⁶ and he left.”

Crown Closing Address, Vol. 6, 1271/20-30

294. The defence knew that Detective McCombie had spoken to the Barbes in August, 1967. At the preliminary hearing, McCombie related that he spoke to Gail Brazeau on August 11, 1967 at her home. He continued:

A. I also spoke [on August 11] with the neighbours next door, a family by the name of Barbe.

Q. Did you receive anything from any of those people whom you interviewed?

¹¹⁶ The Crown's rendition of Mrs. Barbe's timing may be described as creative. She testified that she saw Mr. Phillion sometime after 10:20 p.m.

A. Not at that point I did not, no.

Later, he was asked:

Q. Is it fair to say that you had interviewed both the Barbés?

A. Yes.

Mrs. Barbe was asked at the preliminary hearing about her conversation with McCombie in 1967:

Q. Had you been approached by the police before January, 1972 when you gave your statement? Had you been interviewed before?

A. Yes, in 1967.

Q. Did Detective McCombie interview you, a blond detective?

A. Yes.

Q. Did you give a statement at that time?

A. No; he just talked to me.

Q. You told him what you have pretty well told us today, the same details?

A. Yes, except that I don't think I told him what [Phillion] said about having a ticket on Britannia Highway.

Q. You did not tell him that at that time; that is only something you remembered today?

A. Yes.

At the conclusion of his cross-examination at the preliminary hearing, Mr. Cogan further asked Mrs.

Barbe:

Q. And that is all you can tell us about your knowledge of this case; is that correct?

A. Yes.

Q. And that is the same information that was asked of you in 1967 by the Ottawa Police Department?

A. I think so, yes.

Mr. Barbe, who only testified at the preliminary hearing, was not asked whether he had given a statement to the police in 1967.

Evidence of McCombie, Preliminary Hearing, Vol. 4, 341/40, 378/10
Evidence of Denise Barbe, Preliminary Hearing, Vol. 4, 323/40 to 324/10, 326/10

295. The defence had the opportunity to review a statement that Mrs. Barbe had given in January, 1972. It was produced to her by the Crown during her examination-in-chief at the preliminary hearing to refresh her memory. Mr. Cogan pointed out at that time that

“For the record, the statement is January, 1972, four and a half years after the date the witness speaks of.”

There is a copy of Mrs. Barbe’s handwritten statement in the archives. It largely mirrors her trial evidence.

Evidence of Denise Barbe, Preliminary Hearing, Vol. 4, 317/1 to 318/40, 325/40
Witness Statement of Denise Barbe, Record, Vol. 13, Tab 43

(b) The Undisclosed Materials Relating to the Barbés

296. The undisclosed evidence establishes in more ways than one that, in fact, Mr. Barbe spoke to Romeo Phillion on the evening of *Tuesday, August 8*, the day before the murder, not on August 9, the day of the murder.

Detective McCombie’s undisclosed April 12, 1968 investigation report

297. Detective McCombie’s 8:00 p.m. report of April 12, 1968 included the following:

“It might be noted that the writer took a statement from Gail Brazeau back on Aug. 14/67, regarding this incident and she stated that the last time she saw Romeo Phillion was around 11:00 p.m. on the night of August 8, 1967 and that she had not seen him since that time. This was also verified by her Mother, who stated that he had been driving around sometime during the evening but had not been back since that time. *It was also learned that he had attempted to sell his car to the person living next door at 246 York Street, who also verifies the time as Aug. 8/67 around 10:00 P.M. and he was not seen by this person after that.*” (emphasis added)

McCombie further stated in this investigation report that, as a result of a recent statement given by Gail Brazeau to the New Liskeard Police Department in which she alleged that she had seen Phillion in Ottawa on the day of the murder, he re-interviewed Mrs. Brazeau at her Ottawa address of 248 York Street in April, 1968 (see paragraph 316 *infra*). He then re-interviewed Mr. Barbe at his residence at 246 York Street. He wrote in his report:

“I went next door and spoke to Mr. Paul Barbe, 246 York Street, 233-2378, regarding this incident *and he stated that he remembered very clearly speaking to Romeo Phillion on the night before the murder* as he wanted to sell him his car and he informed him that he was not interested and he placed the time at approx. 10:00 p.m. and he did not see him after that.” (emphasis added)

It is, therefore, now known that McCombie interviewed Mr Barbe three times, on August 11, 1967, August 14, 1967 and again in April, 1968 and, on all three occasions, Mr. Barbe told him that he last saw Mr. Phillion the evening *before* the murder. August 14 had a particular significance because it was the day after McCombie and Coburn had driven Phillion back to Ottawa from New Liskeard, and the day before he was viewed by Mrs. Roy in the lineup at the Ottawa police station. He was, therefore, at the time of Mr. Barbe’s interview on that date, the prime suspect and McCombie would have been acutely interested in whether Mr. Barbe could place him in Ottawa on the night of August 9. Further, since McCombie testified at the preliminary hearing that he spoke to “the neighbours ... *a family* by the name of Barbe”, and to “both the Barbés” on August 11, it can be assumed that Mrs.

Barbe also told McCombie on August 11, 1967 that she last saw Phillion on Tuesday evening.

Investigation Report of McCombie, Apr. 12/68, Record, Vol. 2, Tab 75

The undisclosed willsay of Paul Loyer

298. Mrs. Barbe's belief that it was the Wednesday night was apparently precipitated by her memory that she saw Phillion talking to her husband as she returned from playing bingo. Since bingo was only on Wednesday nights at *Le Coin du Livre* (a fact confirmed by her husband), she was able to say that this happened on the Wednesday of that week, i.e. August 9. Thus, Mrs. Barbe testified at Phillion's trial as follows:

Q. And now dealing with Wednesdays in the summer of 1967, on Wednesday nights, Mrs. Barbe, did you do anything particular?

A. I always go to bingo.

Q. And was that true for every Wednesday?

A. Every Wednesday.

Q. Where was the bingo held on Wednesday nights?

A. On King Edward, le Coin du Livre they call it.

Q. And you say that is on the corner of King Edward?

A. King Edward.

Q. And did you go every Wednesday night?

A. Every Wednesday.

Q. And did you go to the bingo on the Wednesday night after the long weekend?

A. Yes, I did.

Q. We will look at the calendar again, Exhibit No. 20. What date was that?

A. The 9th.

Q. The 9th August?

A. Yes.

Evidence of Mrs. Barbe, Vol, 5, 934/35 to 935/15

299. In the Crown brief retrieved from the archives, there is a statement from one Paul Loyer which reads in full as follows:

“This witness will state that in August 1967, he was a Board Member of the Notre Dame Parish, and as a result was the organizer of a Wednesday night bingo, for the Parish, the Bingo being operated under the name (la Garde Champlain). He will state that during the summer months of 1967, which he recalls the Centennial year, that the Bingos were held on Wednesday night as per usual and that a bingo did take place on Wednesday evening, August 9th, commencing at about 8.15 terminating shortly after 10.00 p.m., that this bingo was held at the intersection of Murray and King Edward avenue, in Recreation Center Building, premises known as (Le Coin du Livre).

This witness will further state that he was aware that Bingos during the summer months which were usually held also on Friday nights, by another Catholic organization was moved back to Tuesday nights, during the months of July and August. (emphasis added)

At the front of the Crown brief there is a list of witnesses with a short description of their anticipated evidence. Besides Mr. Loyer’s name is typed:

“church organizer, re Wednesday night bingo
Evidence; supports statements of Mr. and Mrs. Barbe”

The author does not seem to have appreciated the significance of bingo being moved from Fridays to Tuesdays in July and August. It now seems that Mrs. Barbe could have played bingo at *Le Coin du Livre* on Tuesday, August 8 and/or Wednesday, August 9.

300. Mr. Loyer was not called as a witness at the preliminary hearing or trial. Several references to his name appear on documents that are in the archives.

- His name appears on an undated handwritten document entitled “Not Required Preliminary”. Beside his name are the initials “GJ” (Grand Jury). The writing is that of Mr. Lindsay.
- His name appears typed on the back of the indictment.
- His name and address are on a typed list of Crown witnesses, and seems to have been prepared as a list of witnesses to be subpoenaed. An “X” is handwritten by Mr. Loyer’s name.
- A Sheriff’s Officer swore an affidavit that, on August 12, 1972, he served Mr. Loyer with a subpoena for the trial, then scheduled for September 5, 1972.
- On a handwritten document entitled “Witnesses – Phillion Trial”, Mr. Loyer’s name appears as witness number 11. He is identified, along with Denise Barbe and Paul Barbe, as a “Rebuttal” witness. The writing is that of Mr. Lindsay.
- His name is on a handwritten document headed “Cancel These Witnesses”. The letters “Ph” (phone) appear beside his name. The writing is that of Mr. Lindsay.

Willsay of Mr. Loyer., Record, Vol. 13, Tab 31
 “Not Required Preliminary”, Record, Vol. 12, Tab 4, p. 4287
 Indictment, Record, Vol. 1, Tab 3
 List of Witness Subpoenaed, Record, Vol. 14, Tab 3, p. 4623
 “Witnesses – Phillion – Trial”, Record, Vol. 12, Tab 3
 “Cancel These Witnesses”, Record, Vol. 12, Tab 4, p. 4283
 Affidavit of Service of L. Bordeleau, Record, Vol. 15, Tab 28
 Subpoena of Multiple Witnesses, Record, Vol. 15, Tab 28

301. A typed document entitled “Leopold Roy Murder Occurrence 19693-67. List of Witnesses” includes the name Fernand Bordeleau. Beside the name is written:

“Support evidence of Paul and Denise Barbe re Bingo at Le Coin Du Livre, on evening of August 9th, 1967.”

The only other reference in any materials to Mr. Bordeleau appears on a handwritten list of witnesses for April 5, 1972, during the preliminary hearing, on which is handwritten in brackets:

“Mr. Loyer not Bordeleau re bingo”

“Witness Wed Apr. 5 #2”, Record, Vol. 12, Tab 4

302. Mr. Cogan knew of Mr. Loyer’s existence. He was, of course, privy to the indictment on which Mr. Loyer’s name was typed. As well, the remnants of Mr. Cogan’s own file included the transcript of the preliminary hearing. Three small pieces of paper with a handwritten list headed “Witnesses” are stapled to volume 1 of the preliminary hearing transcript. There are 28 names of Crown witnesses, or potential Crown witnesses written on the pieces of paper, four of the names appearing twice. One of the names is “Mr. Loyer” and beside his name is written “Bingo”. His name is the only one on the list which has “testimonial” information beside it. We believe that this list was likely provided verbally to Mr. Cogan by Mr. Lindsay sometime between the preliminary hearing and the trial, as a list of witnesses whom the Crown might call at the trial. Perhaps Mr. Cogan wrote “Bingo” beside Mr. Loyer’s name because until that time he had been given no information as to whom Mr. Loyer was. “Bingo” would have been a simple abbreviation for Mr. Cogan to record Mr. Lindsay telling him that Mr. Loyer would confirm that bingo was held on Wednesday nights which, in turn, corroborated the evidence of the Barbes. In summary, the evidence suggests that Mr. Cogan only received incomplete verbal disclosure of Mr. Loyer’s

anticipated evidence from the Crown, that he never saw Mr. Loyer's willsay, and that he never knew that in July and August bingo was also played at *Le Coin du Livre* on Tuesday nights (see Appendix 1, paragraphs 79 to 81).

The undisclosed August 8 traffic ticket

303. Unknown to defence counsel at trial, there was an important clue in the evidence of Mrs. Barbe, and that of her husband at the preliminary hearing, which established that they saw Phillion on the evening of Tuesday, August 8, and not, as they testified, in the evening of Wednesday, August 9. Mrs. Barbe testified at the preliminary hearing that during Phillion's conversation with her husband,

A. [Phillion] talked about he had a speeding ticket somewhere but I don't know whether it is true or not. *He said he had a speeding ticket in the afternoon.*

Q. *Which afternoon?*

A. *The same afternoon, the Wednesday, going down Britannia Highway.* I don't know if it true or not. So my husband said "How come you were going so fast? That is pretty crazy." But he didn't answer. (emphasis added)

Mr. Barbe was asked at the preliminary hearing:

Q. Can you tell His Honour everything that was said between you and Mr. Phillion?

A. *He told me he had a speeding ticket, something like that.*

Q. What did he say about that?

A. I told him "You must have gone fast to get a ticket like that".

Q. While talking with Mr. Phillion, where was your wife?

A. My wife after that came in from the bingo and she came and sat down with us.

Q. Sat down with you?

A. Yes, with me, like.

Q. What night of the week was this?

A. A Wednesday, when she came back from the bingo. (emphasis added)

As has been seen, Phillion received a ticket in the Britannia Road area of Highway 17 (which is at the outskirts of Ottawa) on Tuesday, August 8, not Wednesday, August 9, but this was never disclosed. In fact, since Phillion had told Norton and Huneault on January 11, 1972, that he had been ticketed by the O.P.P. in the vicinity of Arnprior after the murder, the defence would have believed that Phillion received the ticket on Wednesday as he drove from Ottawa to New Liskeard. This belief could, in Mr. Cogan's mind, have reinforced the accuracy of the Barbes' memories that they saw Phillion after the homicide (albeit in these circumstances Phillion would have to have returned to Ottawa that night so that he could tell the Barbes about it) which, in turn, would account for Mr. Cogan's readiness to acknowledge, during their evidence, that Phillion was still in Ottawa after the murder (*supra*, paragraph 81).

Evidence of Paul Barbe, Preliminary Hearing, Vol. 4, 330/10-30

Evidence of Denise Barbe, Preliminary Hearing, Vol. 4, 320/20-30

304. The evidence suggests that Mr. Lindsay knew that Phillion received his ticket on Tuesday. If he did, he must have appreciated its significance. The police certainly did. As early as January 13, 1972, Huneault was recording the need to ascertain the date of the ticket in light of what Mr. Barbe was saying (*supra*, paragraph 275). The date Phillion received the ticket was in the Crown brief in the form of P.C. Liboiron's willsay. It was in numerous police reports to which Mr. Lindsay was privy (see paragraphs 269 to 276 *supra*). Yet, in submissions prior to calling Mrs. Barbe as a witness before the jury, Mr. Lindsay said:

“There was some conversation about a traffic ticket that the accused received at one time, but I have asked Mrs. Barbe not to go into that evidence because that may prejudice the accused. That is the evidence I expect, but if Mr. Cogan can say to Your Ladyship that I promised not to go into that conversation, then I certainly shall not breach that undertaking, if I so made it.” (emphasis added)

If there was ever any question as to whether Mr. Cogan knew that Mr. Phillion was given the ticket on Tuesday, his failure to challenge Mr. Lindsay’s statement that the revelation of information about it could prejudice Mr. Phillion’s case in the eyes of the jury resolves it. Since Mr. Lindsay, on the other hand, can be presumed to have known of the ticket’s significance, his statement to the Court was inexplicable.

Submissions, Transcript, Vol. 5, 938/20-30

(c) The January, 1972 Police Reports Regarding the Barbes

305. The police investigation reports detail the change in Mrs. Barbe’s memory of seeing Mr. Phillion on Tuesday night to Wednesday night. In his January 13, 1972 investigation report, Detective Huneault stated that on January 12, 1972 he spoke to Mrs. Barbe:

“Also this date [January] the 12, in the a.m. I was in conversation with Denise BARBE, address 245 York St., telephone 233-8378, in relation to the incident of 1967, at this time she indicates that her husband was employed by the Grey Nuns Retreat Home in Orleans, however that we could return after 17:00 hrs., at which time he would be interviewed here with her.

During the initial conversation with Mrs. BARBE she indicates that she remembers very well that *on the date of the murder* she recalls having went to bingo, at approximately 18:30 hrs., at the intersection of King Edward and Murray, the premises known as Le Coin Du Livre, and that she was in the habit of going every Wednesday night, *is positive that this is definitely a Wednesday night*, and that on returning on that night of the bingo, at approximately 22:00 to 22:15 hrs., her husband was seated on the front veranda, and that he was talking to the accused PHILLION whom she knew very well, and did not trust, that she entered her home and subsequently returned to the veranda as her husband and PHILLION

were speaking in a low voice and due to her mistrust of PHILLION knew that he was attempting to borrow money and wished to discourage her husband from doing so.

Subsequently at a later in the evening of January the 12, at approximately 20:00 hrs, D/Sgt. Norton, Detective Nadori and myself again proceed to the above residence at this time discussed very briefly with Mr. and Mrs. [Barbe] about this occurrence at the time arrangements were made that a full witness [statement] would be obtained from them on the evening of January the 13, after the supper hour.” (emphasis added)

Later in the report, Huneault identified a number of investigative steps that needed to be taken. Items

2 and 6 were as follows:

“Item 2, attempt to identify the police officer who stopped PHILLION for speeding on Highway 17, east of Ottawa, sometime after the murder, and at 22:00 hrs., on the date in question. *Phillion alleged that this did occur and made reference to it on August the 9, 1967, while in conversation with Paul BARBE, of 246 York St.*

.....

Item 6, reinterview and obtain statements from Mr. and Mrs. Paul and Denise BARBE, of 246 York St., who apparently can place the accused in Ottawa, on York St., at about 22:00 hrs., on August the 9, 1967, the night of the murder.” (emphasis added)

Huneault, then, although he made no other reference to it in his report, must have been told on January 12 by either, or both, of the Barbes that they remembered Phillion mentioning that he had received a speeding ticket on Highway 17 earlier in the day on which they were speaking. Huneault made no reference to McCombie’s 1967 and 1968 reports which made it clear that the Barbes saw Phillion on Tuesday night, not Wednesday night. Huneault’s item 2 on his list of things to do establishes that he considered it important to corroborate the Barbes’ “memory” that they saw Phillion on the Wednesday by locating the ticket in question. This makes it all the more extraordinary that once Huneault and Nadori came to know on January 13 that Phillion had received a ticket on August 8, 1967, the Crown still persisted in using the now-known-to-be unreliable evidence of Mrs. Barbe by calling her as a Crown witness at the trial.

306. Huneault wrote a further investigation report on January 14, 1972. In it, he reported that on January 13, he and Nadori drove the Barbes to the police station. Mrs. Barbe was asked to write out her own statement, which she did. Huneault summarized her statement in part as follows:

“On Wednesday, August 9, 1967 [Mrs. Barbe] indicates that she saw [Phillion] when she came home from her work, indicating that she worked at the time until four in the afternoon at the Department of National Defense Revenue and Taxation at 444 Sussex Dr. and that she would have arrived home at approx. 4:15 P.M. on that date.

.....

While they were out on the veranda, Phillion also told her husband that that particular afternoon he had got a ticket for speeding on the Britannia Highway where the drive-in was.

After a very brief conversation on the veranda, her husband indicated that it was late and that they were going to bed so he left to cross the street. He leaned up against the car looking next door at the Brazeau residence. She indicates that they looked at the news on television and retired to bed at approx. 11:30 P.M. and at that time noticed he was leaving in his car.” (emphasis added)

In her January 13, 1972 handwritten statement, Mrs. Barbe wrote:

“But outside I ask my husband if he knew somebody that would buy [Romeo’s] car and my husband said no. He said that he was trying to get Gail to go with him but that Mrs. Brazeau was not letting Gail out of the house. *While we were outside he told my husband that afternoon he got a ticket for speeding on the Britannia highway where the drive-in is, so we do not know if the ticket is true or false, we just did not believe him.*” (emphasis added)

Nadori obtained a typewritten statement from Mr. Barbe which is part of the Crown brief from the archives. It reads, in full, as follows:

“In the summer of 1967 one night I went home from my work and my wife Denise showed to me the newspaper with the picture of a man on it, who the Police wanted for the murder of the Fireman on Friel St. in Ottawa. My wife thought that the picture in the paper looked like Romeo Phillion the boy who used to go with the girl next door Gail Brazeau. I looked the picture again and I thought that it looked a little bit like Romeo.

Two or three days before I saw the picture I was seating on the verandah in front of the in front of the house about at nine thirty, my wife just got back from the bingo that she went to every Wednesday, when I saw Romeo’s car parked across the street and Romeo came over to me he asked me if I knew anybody who would buy his car. I told him that I did not know anybody. After that he asked me for some money, he first wanted \$5.00, I told him that I did not have any then he wanted \$3.00 I did not give the money to him. He said that

he wants to go down home to Cobalt. *Before he asked me for the money he told me that the Police stopped him I think he said on Britannia road for speeding. I told him that he should not have driven so fast.* He was dressed all in black, he had on a turtle neck sweater and black pants. I went to bed in my bedroom about half hour latter, my wife asked me to look out by the window if Romeo was still out there I saw his car was still out there with him in it. The car was I think a Mercury convertible black and red inside. The car was not there the next morning and I don't remember if it was there when I got home from work that night." (emphasis added)

Huneault also summarized Mr. Barbe's statement in his January 14, 1972 report. There is no further reference to the Barbes in the police reports.

Investigation Report of Huneault dated Jan. 14/72, Record, Vol. 2, Tab 101
See also Evidence of Mrs. Barbe, Preliminary Hearing, Vol. 4, 320/20

Conclusion

307. Defence counsel was left in the dark regarding the critical evidence of the Barbes. Mrs. Barbe's evidence was used by the Crown to prove that Phillion was in Ottawa on the night of August 9, after Mr. Roy's murder. In fact, as was known to the police and was presumably known to the Crown, a combination of the 1967 statements of the Barbes and knowledge that Phillion received a ticket on August 8, established not only that Mrs. Barbe was wrong, but also that the evidence of the Barbes circumstantially corroborated Phillion's whereabouts on August 9 – namely that he left Ottawa early that day and did not return – because they did not see him again after 10:00 p.m. on August 8. It is now apparent that Phillion drove to Arnprior on Tuesday, August 8 and was ticketed *en route*, and on Tuesday night or Wednesday morning, August 9, left Ottawa to drive to Toronto. The 1972 statements of the Barbes, particularly Mrs. Barbe, also raise questions as to the ethics of the investigation conducted by Huneault and Nadori:

- What caused Mr. Barbe to revise his memory from seeing Phillion on Tuesday evening when he spoke to McCombie on August 11 and 14, 1967, and in April, 1968, to Wednesday evening, when he spoke to Huneault and Nadori on January 12, 1972? Similarly, what caused Mrs. Barbe to revise her August 11, 1967 statement and say in 1972 that she saw Phillion on Wednesday evening such that it “coincidentally” supported the police theory? ¹¹⁷

4. THE UNDISCLOSED STATEMENTS OF MARIE AND GAIL BRAZEAU

Introduction

308. In something of a carbon copy of the Barbes, by 1972 Mrs. Brazeau and her daughter also were providing incriminating evidence against Mr. Phillion in sharp contrast to their undisclosed 1967 statements to Detective McCombie.

(a) The Brazeaus’ Version of Events that were Disclosed to the Defence

309. Gail Brazeau was Romeo Phillion’s girlfriend in 1967. She drove to Ottawa with him in early August, 1967. They stayed one night at the residence of her mother, Marie Brazeau (Mrs. Brazeau), at 248 York Street. The next day Mrs. Brazeau asked Romeo to leave because she could not afford

¹¹⁷ It might also be asked how it was that the Barbes could remember in 1972 that Phillion was dressed all in black when they saw him in 1967, a manner of dress which “coincidentally” matched the description of the man seen by Mrs. Robitaille at the front door of 275 Friel Street?

to look after him as well as her daughter, but allowed Gail to stay with her. Romeo moved out and was seen by Mrs. Brazeau and her daughter on at least one of the ensuing days. Both claimed to have seen him talking to Mr. Barbe outside their building. Mrs. Brazeau was called at Phillion's trial and testified to this effect. She was asked:

Q. And Mrs. Brazeau, do you remember one night in August looking out of the window of your house?

A. Yes. It was not at night. It was around ten o'clock.

Q. Is that ten o'clock in the morning?

A. No. Ten at night; ten in the evening.

Q. And what room were you in?

A. In my own room in the front of the house.

Q. And that night, was that during the same week that Mr. Phillion came to your place?

A. I cannot remember that.

Q. And when you looked out of the window what did you see?

A. I saw Mr. Phillion talking with Mr. Barbe, my neighbour.

Q. And how long did you watch?

A. I just glanced through my window casually and I saw Mr. Phillion in conversation with Mr. Barbe.

Q. Where were they located?

A. Between the house of Mr. Morris and back of Mr. Barbe; in between the houses.

Q. And did you see Mr. Phillion again after that?

A. Not around those days, no.

Mrs. Brazeau, therefore, was unable to state the day of the week that she saw Phillion talking to Mr. Barbe. Gail Brazeau testified at the preliminary hearing and gave evidence that was incriminating

to Phillion (*infra*). However, she was not called at trial. There is nothing in the trial record to suggest why not. However, materials in the archives suggest that the police may not have been able to locate her by the time of trial.

Evidence of Mrs. Brazeau, Vol. 4, 790/40 to 791/15

(b) The Undisclosed Evidence Relating to the Brazeaus

Introduction

310. The defence knew that Mrs. Brazeau had spoken to the police in 1967 as a result of the following exchange during her cross-examination at the preliminary hearing:

Q. When were you first contacted by the police concerning this case?

A. It was in August.

Q. August of which year?

A. 1967.

Q. Were they Ottawa police officers?

A. Yes.

Q. Did you tell them what you have told us today?

A. It is five years past. I cannot remember.

Q. Did you give a statement to the police in 1967?

A. No.

Q. Do you know which detective it was, the name of the detective?

A. McCombie.

Q. Detective McCombie. He spoke to you about Mr. Phillion did he?

A. Yes.

Q. And about the murder that took place in Ottawa?

A. It was for that subject that he came.

Q. Did Mr. McCombie write down what you told him?

A. I don't remember.

Q. Do you know how many times he saw you?

A. At least twice.

Q. In August?

A. Yes, in August.

In addition, Detective McCombie testified that he had interviewed her before November 2, 1967, but had not taken a statement from her. What Mr. Cogan did not know was that Mrs. Brazeau had, on August 14, 1967, told McCombie that she had last seen Phillion in the area on the night *before* the murder (*infra*).

Evidence of Mrs. Brazeau, Preliminary Hearing, Vol. 4, 309/15-40
Investigation Report of McCombie, Apr. 12/68, Record, Vol. 2, Tab 75

311. A review of the several statements that were given by *Gail Brazeau* to different police officers gives rise to a confusing picture of contradictory statements which, as time proceeded, became progressively more damaging to Phillion. The statements were variously recorded by the police in synopsis form or as actual statements. As a sign of the times, one of Gail Brazeau's 1972 statements was produced to her over the objection of the Crown on a ruling at the preliminary hearing by Beaulne J. but defence counsel was prohibited from reading it! The remainder of her 1967, 1968 and 1972 statements were not disclosed. In fact, defence counsel had reason to believe

that she had not provided any statements during the original investigation – during cross-examination at the preliminary hearing, Mr. Cogan had asked her:

Q. Was [Feb. 1972]¹¹⁸ the very first time you were seen by the police department with regard to this matter, this case?

A. Yes.

McCombie, however, in his examination-in-chief at the preliminary hearing was asked:

Q. Prior to going to New Liskeard (in August, 1967), in your investigation did you come across a person by the name of Gail Brazeau?

A. I did.

Q. Can you tell His Honour what contact, if any, you had with her, not what conversation was had, but what investigation you made?

A. I went to her house, I believe 248 York Street, and had a conversation with her and with her mother.

Q. Do you remember the date and time?

A. Yes; that was on the 11th August. I also spoke with the neighbours next door, a family by the name of Barbe.

Q. Did you receive anything from any of those people whom you interviewed?

A. Not at that point I did not, no.

Q. What was the next time you had contact with the Brazeaus?

A. I do not recall the date, sir.

In cross-examination, he testified that he had interviewed Gail Brazeau in 1967, but had not taken a statement from her.

Evidence of Gail Brazeau, Preliminary Hearing, Vol. 4, 290/40, 296/40 to 299/40

Evidence of Ellen Brazeau, Preliminary Hearing, Vol. 4, 309/15-40

Evidence of McCombie, Preliminary Hearing, Vol. 4, 341/20-50, 378/5-40

¹¹⁸ The defence found out later in her cross-examination that she had also spoken to the police in January, 1972.

(i) ***Detective McCombie's August 1967 investigation reports regarding his conversations with Gail Brazeau***

312. Two of Detective McCombie's undisclosed investigation reports from 1967 refer to conversations that he had with Gail Brazeau. Both conversations seem to have been a result of McCombie trying to locate Phillion after Mrs. Roy's identification of him and his brother as possible look-alikes to her husband's killer. In the first entry on August 13, 1967, McCombie wrote:

“On Aug. 11/67 at approx. 11:30 p.m. a telephone call was received from Gail Brazeau at 248 York St. who stated that she had *further* information pertaining to this occurrence.”
(emphasis added)

There is no report prepared by McCombie for the previous occasion that he spoke to her.¹¹⁹ It may have been earlier that day on August 11 since McCombie testified at the preliminary hearing that he spoke to Gail and her mother at the mother's residence at 248 York Street that day. However, as will be seen, McCombie outlined the contents of his conversations in August, 1967 with Gail in the first investigation report that he prepared on April 12, 1968. He also referred to a further interview with her on August 14, 1967 in his April 12 report (*infra*).

Investigation Report of McCombie, Aug. 13/67, Record, Vol. 2, Tab 25
Investigation Report of McCombie, Apr. 12/68, Record, Vol. 2, Tab 75
Evidence of McCombie, Preliminary Hearing, Vol. 4, 341/40

¹¹⁹ In his evidence at the preliminary hearing, McCombie testified:

“It is possible that a witness statement may have been taken from [Mr. Herbert] at one time, *also from Gail Brazeau*, but I don't recall.”
(emphasis added)

Evidence of McCombie, Preliminary Hearing, Vol. 4, 378/30

313. In this same report of August 13, 1967, McCombie wrote that Gail recalled that “*on the 9 of Aug.*” she saw Romeo talking to her brother-in-law, Maurice Langlois. It is open to question whether McCombie accurately recorded the date of August 9 in this report because, as will be seen (*infra*, paragraph 316), on April 12, 1968, when McCombie’s mid was turned directly to the issue of when Gail last saw Romeo in Ottawa, he reported that Gail had told him in 1967 that she had last seen Romeo at 11:00 p.m. on *August 8*.

Investigation report of McCombie, Aug. 13/67, Record, Vol. 2, Tab 25

314. In another report on the same day, August 13, 1967, McCombie advised that Gail telephoned him again on August 12 to tell him that she had received a letter from Phillion. McCombie went to her residence and picked it up. It was postmarked August 11, 1967 and had been mailed from New Liskeard. There is a typed English translation of the letter in addition to the original which we located in the archives. It can be best described as an unrequited love letter. In the letter, Phillion wrote:

“When I left Ottawa, I went to Toronto, to Armand and I continued here, in New Liskeard.”¹²⁰

As a result, McCombie obtained permission from his superiors to go to New Liskeard with Detective Coburn to locate Phillion, arrest him on the unrelated break and enter charge and bring him back to Ottawa for investigation on the homicide.

Investigation Report of McCombie, Aug. 13/67, Record, Vol. 2, Tab 25
 Evidence of McCombie, Preliminary Hearing, Vol. 4, 342/10
 Letter from Romeo Phillion to Gail Brazeau and translation, Record, Vol. 14, Tab 10

¹²⁰ The Crown disclosed this contact between McCombie and Gail Brazeau to the defence. The defence also received a copy of the letter that Phillion wrote to Gail. See “Synopsis”, Crown Brief, Record, Vol. 13, Tab 4

(ii) *Gail Brazeaus's Statutory Declaration to the New Liskeard police in April, 1968*

315. In April, 1968, the New Liskeard police decided to conduct an investigation into Phillion's possible involvement in Mr. Roy's homicide. On April 4, 1968, Gail Brazeau was "picked up for questioning concerning her and Romeo Phillion's movements during the early part of August, 1967 when the Roy murder was committed in Ottawa." They took a statutory declaration from her. This was not disclosed to the defence. She told them that she and Romeo had been living in North Bay with Phillion's mother. On Sunday night (August 6), they drove to Ottawa to see Gail's mother. They arrived early Monday morning and stayed at her mother's on Monday night. On Tuesday, they had an argument and Romeo left the house that afternoon. She saw him drive by the house several times that evening. She then stated:

"On Wednesday the day of the murder I saw Romeo Phillion pull up and park the red convertible across the street from my mother's place and he got out and walked over and talked to the man who lives in the other part of my mother's house. It was a warm day and this fellow was sitting outside on his front step. This was between 1.00pm and 2.00pm in the afternoon and Romeo was wearing all black clothing, black pants and a black sweater, he likes all black clothing and usually wore it. I was in the upstairs window at my mother's and I watched him all the time he was talking to the fellow next door, they stood outside and talked for about 20 minutes and then Romeo got in the car and drove away towards King Edward Street As soon as Romeo drove away I went out and talked to the fellow next door and he told me that Romeo was trying to sell him the car for \$150.00. Romeo had taken the car to a body shop on Nelson Street to see how much it would cost to get it fixed on Monday the day we got to Ottawa and the fellow at the body shop had told him to bring it back but I don't know whether he did or not." (emphasis added)

She told the police that she read about the murder in the Wednesday evening paper, that had a drawing of the suspect in it which looked like Romeo (she was wrong – the suspect drawing first appeared in the papers on August 11). She said that Romeo had been wearing all black clothing that afternoon, and that the police had first come to her house the next day, Thursday, "and asked about Romeo". She was asked to guess who might have been with Romeo on Wednesday afternoon:

Q. If anyone was with Romeo on the afternoon of the murder who do you think it would be?

A. If anyone it would be Bev Lacey, it was him and Romeo who stole a coloured T.V. from a basement apartment on Laurier Street and they robbed 3 or 4 mail boxes together in Ottawa. I know this because Romeo showed me one of the mail boxes behind a school on Laurier Street. Lacey lived in an apartment about 4 blocks from my mother's place and he and Romeo were together a lot."

She was asked if Romeo was

"mad enough the day of the murder at you for leaving him that he would be carrying a knife".

She replied

"Yes both my mother and myself had told him to leave and he wasn't very happy".

Statutory Declaration of Gail Brazeau dated Apr. 4/68, Record, Vol. 2, Tab 75

(iii) *Detective McCombie's April 12, 1968 investigation report as it pertained to Gail Brazeau and Mrs. Brazeau*

316. The New Liskeard police forwarded this information to Detective McCombie. In his undisclosed April 12, 1968 8:00 p.m. report, McCombie responded to some of the claims that Gail Brazeau had made in her statutory declaration:

"It was learned from P.C. Brown that Gail Brazeau was now telling them that she believed Romeo Phillion was responsible for the murder of Mr. Roy and that on the day of Aug. 9/67, he was in Ottawa because she had seen him around 2:00 P.M. on the day of the murder.

It might be noted that the writer took a statement from Gail Brazeau back on Aug. 14/67, regarding this incident and she stated that the last time she saw Romeo Phillion was around 11:00 p.m. on the night of August 8, 1967 and that she had not seen him since that time. This was also verified by her mother, who stated that he had been driving around sometime during the evening but had not been back since that time. It was also learned that he had attempted to sell his car to the person living next door at 246 York Street, who also verifies the time as Aug 8/67 around 10:00 P.M. and he was not seen by this person after that.

The New Liskeard Police Department anet (sic) a statement which was sworn to by Gail Brazeau to which she states that she had seen Phillion in Ottawa on the day of the murder Aug. 9/67 around 2:00 P.M. along with a photograph of the knife she had picked out of the

hardware store up there as being similar to one she had seen in the glove compartment of Phillion's car when they had driven from Toronto to Ottawa three days prior to the murder and she had not seen the knife since nor has she seen the clothing that was worn by Phillion on that date.

The writer then returned to *Mrs. Brazeau's* at 248 York St. where she was questioned again in regards to this *and she then changed her story* and felt that she had seen Romeo Phillion on the day of the murder due to the fact that he had told her he had secured an apt. on Friel Street for himself and Gail to live in. *It might be noted that at the time Mrs. Brazeau was questioned at length and on several occasions and at no time did she mention about Phillion obtaining an apartment on Friel Street or of seeing him on the day of the murder.*" (emphasis added, previously quoted *supra* paragraph 297)

In other words, Gail Brazeau's statement of August 14, 1967, which was not found in the archives, supported the position that Phillion likely left Ottawa late on the night of August 8 or early in the morning of August 9, since she did not see him after 11:00 p.m. on August 8. As in the case of Mr. and Mrs. Barbe, McCombie spoke to Gail Brazeau at an acutely significant time, between his return of Phillion to Ottawa and the lineup arranged for the next day. It is for this reason that his entry on his August 13 investigation report that Gail told him she saw Phillion on August 9 is likely in error, because McCombie would have realized its significance to a case that Phillion was the culprit if Gail had said this. Gail's August 14 statement also supported the original position of the Barbes that they spoke to Phillion outside their apartment on the evening of August 8, not August 9. Mr. Cogan knew none of this. As well, he did not know that Mrs. Marie Brazeau had, in August, 1967, corroborated her daughter's statement that Phillion had left Ottawa on August 8 such that McCombie was perfectly comfortable in discounting Gail's change in position as to the day she last saw Phillion when he spoke to her mother again in April, 1968.

(iv) Gail Brazeau's interview with Huneault and Nadori in 1972

317. After Mr. Phillion's confession, Huneault and Nadori decided to re-interview Gail Brazeau.

It was listed by Huneault as a "to do" in his January 13, 1972 report:

"Item 7, reinterview and obtain statements from Phillion's girlfriend, Gail Brazeau, presently in Montreal, Quebec, who can place the accused in Ottawa on York at 14:00 hrs. on the date of the murder."

The 14:00 time would have been taken from her April 4, 1968 statutory declaration.

Investigation Report of Huneault dated Aug. Jan.13/72, Record, Vol. 2, Tab 98

318. Huneault and Nadori obtained a copy of Gail's criminal record. On January 14, they spoke to Gail's mother, Mrs. Marie Brazeau, in Ottawa. Huneault recorded her statement in his report of that date:

"She was questioned at length as to attempts to place a date on the time when Gail Brazeau and Romeo Phillion came to her residence in the month of August 1967, however the only information that could be ascertained was that Gail Brazeau did in fact remain in Ottawa at the time of this occurrence, however that Romeo had remained only one night prior to the murder as she had kicked him out of the house however he has been seen on different dates after that time however this could not be pinpointed."

Mrs. Brazeau's willsay in the Crown brief, however, went much further. For example, it included the following:

"Will state that she recalls prior to seeing the composite drawing in the *Le Droit* paper on approximately August 11th, that Gail had come home with Romeo Phillion, on about a Sunday or Monday, that Romeo, had remained at her residence on maybe the Monday night, however that subsequently she had thrown Romeo out of the house, forbidding him to return. ...

She will state that after the evening she threw Romeo Phillion from the house, forbidding him to return, that she had observed him in the area *several days after*, and on one particular occasion through the bedroom window in the late evening, when he was talking to the man next door. She will indicate that she did not understand the conversation at this time but

was positive that Romeo Phillion was the person talking to the person next door, Mr. Barbe.” (emphasis added)

Investigation Report of Huneault, Jan. 14/72, Record, Vol. 2, Tab 101
Willsay of Marie Brazeau, Crown Brief, Record, Vol. 13, Tab 27

319. On January 18, Detectives Nadori and Huneault drove to Montreal where he contacted Gail at her residence. She agreed to be questioned at a nearby police station. Early on in his January 19, 1972 report of this meeting, Nadori made the following observations:

“Regarding Miss Brazeau, it may noted that she appears to be of below average intelligence, it is apparent that her recollection of past events is only fragmentary and that during conversation regarding the issue involved in this investigation, she made statements that are quite contradictory to statements that she has made in the past regarding the same matter.

Following that, she was shown the statement that she gave to the New Liskeard Police on April 4th, 1968 for the purpose of verifying certain factors, she stated that everything contained in the statement in question was correct, as far as she could remember. For the purpose of verifying certain factors in relation to the above statement, a second declaration was taken from her by the writer.”

In her statement to Nadori, Gail said that Romeo had not stayed overnight at all at her mother’s apartment in Ottawa. She now claimed, however, for the first time, to have last seen Romeo *late at night* while she was in Ottawa. Nadori wrote:

“She goes on to state that she last saw Romeo Phillion, in the vicinity of her home, approx. at 0200 hrs. of the third day,¹²¹ that she was back in Ottawa.

Regarding this incident, she states that the night in question was particularly warm and their next door neighbour, ‘Mr. Barbe’ was seated outside in the verandah, and she saw Romeo approach this person, and talked to him at length. She states that the following morning, she saw her mother speak to Mr. Barbe and then her mother told her that Romeo wanted to sell his car to Mr. Barbe, when they saw them speaking to each other earlier.

¹²¹ This is a significant change from what she had told P.C.s Brown and Bolger of the New Liskeard police on April 4, 1968. She had then said that she last saw Romeo between 1:00 and 2:00 *p.m.* on the day of the murder talking to the Barbes (*supra* paragraph 315).

She also stated, that on the following day, her mother Mrs. Brazeau showed her, one of the daily newspapers in Ottawa, and that particular time, there was a story in the paper in connection with a murder, that occurred on Friel St. the day before and that there was a drawing of a man with the story also.

She states that both she and her mother agreed that the drawing looked like Romeo. For the ease of verifying as to exactly when Miss Brazeau saw Phillion in Ottawa for the last time, identical situation was presented to her, was by, she was ask by the writer, as to on what day and what time, did she last saw Romeo Phillion in Ottawa, is the earlier indicated newspaper article and the drawing appeared on a Thursday.¹²²

Regarding this, she stated that she did not see Romeo on that Thursday that the article appeared in the paper, *and that she did not see Romeo during the daytime on the day previous, "Wednesday" that she last saw this person at approx. 0200 hrs. on that Wednesday when he was speaking to Mr. Barbe.*

.....

Miss Brazeau was questioned regarding the clothing of Phillion at the time that she last saw him in Ottawa, which would be on Wednesday in question, "August 9, 1967" And she stated that Romeo at that time, wore dark trousers, a red shirt, which he always wore opened and a black T shirt underneath this." (emphasis added)

She gave contradictory stories as to whether or not Phillion had ever carried a knife. Romeo, she said, had never told her that he had committed the murder.

Investigation Report of Nadori dated Jan. 19/72, Record, Vol. 2, Tab 106
Investigation Report of Huneault dated Jan. 14/72, Record, Vol. 2, Tab 101

320. This interview raises valid suspicions about Huneault and Nadori's interview methods. Nadori himself described Gail as "of below average intelligence" and that her memory was "only fragmentary". As has been explained, the Barbes' recollection of their talking one evening to Phillion changed from Tuesday evening in 1967 to Wednesday evening in 1972. Gail Brazeau's memory on January 18, 1972 went through a similar metamorphosis that, if true, corroborated the new memories of the Barbes. Originally, on August 14, 1967, Gail told McCombie that she had last

¹²² This paragraph is as garbled in the investigation report.

seen Romeo around 11:00 p.m. on August 8, the day before the murder. This, as McCombie pointed out in his April 12, 1968 report, was in accord with the Barbes' recollection at that time. On April 4, 1968, Gail told the New Liskeard police that she last saw Romeo between 1:00 and 2:00 p.m. on August 9, forty-five minutes before the murder, talking to the Barbes. McCombie considered this new version to be unbelievable. But, of course, the time of 2:00 p.m. bore no correlation to the Barbes' new claim in 1972 that they spoke to Romeo at 10:00 p.m. on the night of the murder. The new concordance of stories whereby, on January 18, 1972, Gail, for the first time, changed the time of "between 1:00 p.m. and 2:00 p.m. in the afternoon" (per her statutory declaration), to "0200 hrs. of the third day ... she states that the night in question was particularly warm and their next door neighbour, Mr. Barbe was seated outside in the verandah, and she saw Romeo approach this person ..." (per Nadori's January 18, 1972 interview) provides strong circumstantial evidence that Nadori fed her the new story. Any other conclusion depends on accepting coincidences that are entirely unlikely.

Statutory Declaration of Gail Brazeau, Apr. 4/68, Record, Vol. 2, Tab 73
Investigation Report of Nadori dated Jan. 19/72, Record, Vol. 2, Tab 106

321. On January 21, 1972, Huneault and Nadori drove to Richmond Hill, north of Toronto, and interviewed Gail Chartrand, Donald Phillion's girlfriend in 1967. The police had already investigated her criminal record. In her statement, which was in the archives, she claimed that Donald had told her in 1967 that Romeo had come to New Liskeard because he "was running scared and that it had something to do with a break-in and a stabbing, in Ottawa, and that he took off from

there.”¹²³ She told them that on one occasion she had seen Romeo playing with a pocket knife. In his January 23, 1972 investigation report, Huneault wrote that after studying the statements of Gail Brazeau (Jan. 18) and Gail Chartrand (Jan. 21)

“... at this time it was quite obvious since the last statement was obtained from Miss Chartrand, that Gail Brazeau was definitely not telling us everything she knew and as a result, a long distance telephone call was placed to Montreal, at which time I was in direct conversation with Gail Brazeau, at which time I advised her of the information we had received from Gail Chartrand, who appeared to have a very good memory and knowledge of her actions and whereabouts on or about August, 1967, and indicated to her it was quite apparent that she had omitted considerable information from her witness statement. At this time she indicated that her English was very poor (all conversation conducted in French) and that she had not clearly understood Detective Nadori’s questions, however, at this time she indicated that she was presently prepared to give us a considerable amount of information which would be extremely important, namely conversations that she had had and instructions from Romeo Phillion after the murder of Leopold Roy, when she resided with him for a considerable length of time and also information just prior to Mr. Roy’s murder in June, July and August of 1967.

Gail Brazeau at this time over the telephone indicated she did not wish to discuss this on the telephone and as a result, I advised her that we would be proceeding to Montreal shortly, advising her by telephone prior to our departure for the purpose of obtaining a complete witness statement.” (emphasis added)

Investigation Report of Huneault, Jan. 23/72, Record, Vol. 2, Tab 108
Statement of Gail Chartrand, Jan, 21/72, Record, Vol. 13, Tab 48

322. On January 24, 1972, Huneault and Nadori interviewed Gail Brazeau again at the offices of the Homicide Squad in Montreal for four hours. This time they typed her statement. This was the statement that was produced during her cross-examination at the preliminary hearing (see paragraph 311 *supra*). It began with the following question:

¹²³ Donald Phillion was interviewed in the Archambault Penitentiary on January 24, 1972, and denied saying this to Gail Chartrand. Ms. Chartrand’s claim may have been formulated by her because she was living with Romeo and Donald in New Liskeard when Romeo was arrested within days of his arrival in New Liskeard, and transported to Ottawa where he was investigated for Mr. Roy’s homicide.
Investigation Report of Nadori, Jan. 25/72, Record, Vol. 2, Tab 109, p. 2

“We would like to ask you questions, in connection with your relationship with Romeo Phillion, in the month of August 1967. We understand that you have already given a statement to the New Liskeard Police, regarding this matter in April of 1968. I would like to ask you whether or not you have recalled anything else since.

She replied:

“In the beginning of August 1967, Romeo Phillion and I left from North Bay to Ottawa, because he wanted to come to Ottawa, when we arrived we moved in with his sister, Francoise Lacasse and Maurice her husband. They gave us a room in the front of the house, I think we stayed there about 3 days. Sometime during the first 2 days, we were driving around Sandy Hill, Romeo drove around that building at the corner of Besserer and Friel Sts. During those 2 days a few times, and he mentioned to me that the people in there, had a lot of money.”

This was the first time Ms. Brazeau had come up with this story. In his report, Nadori supplemented Ms. Brazeau’s new claim. He wrote:

“Miss Brazeau stated that she did not know as to what Romeo was talking about.

The writer has drawn a map of the area concerned and Miss Brazeau has pointed out the building to which she referred to, initialling same along with affixing the date January 24th, 1972.

She described the building as a big red brick apartment building.”

She also gave a new version which tied the time of the conversation that she saw Romeo having with Mr. Barbe with seeing the composite photograph of the suspect in the newspaper which, if true, reinforced her claim that suggested the former event occurred on the Wednesday evening. She also claimed that Phillion used to carry a knife around. Her statement said:

“Romeo hung around the house on York St. the first day that I went home, the second day I didn’t see him, and on the evening of the third day, I saw him arrived in front of the house in his red car, then I saw him speak to Mr. Barbe, and the day after I learned that he had been speaking about selling his car and trying to borrow some money from him. The next day after that I didn’t see him, and the next day after that my mother showed me the Le Droit Paper that she was receiving daily. There was a story about the murder on Friel St. and there was the drawing of the person who was supposed to have done it. 1 or 2 days after this I received a letter from Romeo, from New Liskeard, and I gave this letter to a Detective from the Ottawa Police.”

323. The contents of this interview are deeply suspicious. They cast a potential cloud over all the interviews conducted by Huneault and Nadori. The officers' determination to obtain more "information" from Gail was considerable. They had already, by their own admission, told her what they had been told by Gail Chartrand, that they believed Chartrand, and were thus able to tell Gail Brazeau that "she had omitted considerable information from her witness statement." They elected to interview her not in her home, but in the Montreal Homicide Squad offices. They questioned her for four hours. By now, Huneault and Nadori had considerable information about the case, including likely all relevant newspaper articles. Gail herself remembered that during this interview the police told her that they had received information that she was with Romeo when he committed the murder. If any credit could ever have been placed on anything said by Gail Brazeau (*viz.* McCombie's comments on April 12, 1968), no credit can be placed on what she said in this interview of January 24, 1972.

Evidence of Gail Brazeau, Preliminary Hearing, Vol. 4, 294/10-50

(v) *Gail Brazeau's evidence at the preliminary hearing*

324. Nevertheless, Gail Brazeau was called as a witness at the preliminary hearing. In her testimony, she repeated her claim about the drive past the building at 275 Friel, and that Romeo said to her, "They must have a lot of money in that place". She did not, she testified, view the remark as serious at the time. The building which she had gone past many times was, she said, "the one with the guy who got murdered". She identified 275 Friel Street from a photograph. She also remembered seeing Romeo speaking to Mr. Barbe but could not say on what day this had occurred,

but suggested that it was likely on a Tuesday or a Wednesday. She remembered that at the time he was wearing a red-pinkish coloured shirt, a black sweater and jeans. He did not, as far as she knew, own a suit.

Evidence of Gail Brazeau, Preliminary Hearing, Vol. 4, 274/40 to 279/40, 286/20 (p. 278 is missing), 289/40, 290/30, 292/40,

Conclusion

325. In conclusion, by 1972, Gail Brazeau was, as McCombie had appreciated as early as in 1968, an unreliable historian. This, in itself, would not be particularly material to this application because she was not called at Phillion's trial. However, there were two features of her involvement, and that of her mother, in the case that Arthur Cogan did not know but that are now known.

- (1) When Gail first spoke to McCombie in August, 1967, she related that she had last seen Phillion at 11:00 p.m. on August 8, the day before the murder, in circumstances that matched the Barbes' 1967 memories, and that "she had not seen him since that time". It was unlikely that if Phillion had remained in Ottawa on Wednesday, as the Crown alleged he must have, he would not have been seen by Gail during the day. After all, his primary *raison d'être* at that time was to restore his relationship with Gail – hence, his driving around and telephoning her mother's apartment where Gail was staying before he left Ottawa, and the letter of unrequited love that he wrote to Gail as soon as he returned to New Liskeard. Gail, therefore, provided material evidence of Romeo's innocence in her first statements to McCombie but the defence had no disclosure of them. Nor did the defence know that in 1967, Gail's mother told McCombie that she had not seen Phillion in Ottawa on the day of the murder.

- (2) Gail's new memories in 1972, recorded by Nadori and Huneault in her interviews with them, reflected, at best, tunnel vision and, at worst, process corruption on the part of Nadori and Huneault. The defence was entitled to have this information as the basis for launching an attack on the propriety of their investigation as a whole. The defence would not have had her statements from 1967, 1968 or even the one she gave in Montreal on January 19, 1972. The Minister now has the disclosure and is in an excellent position to draw his own conclusions as to how the Gail Brazeau 1972 revelations undermine the integrity of Nadori and Huneault's entire investigation in 1972.

5. UNDISCLOSED EVIDENCE WHICH WOULD HAVE ASSISTED IN CHALLENGING MRS. ROY'S IDENTIFICATION OF MR. PHILLION AS THE INTRUDER

Introduction

326. The Crown relied on Mrs. Roy's identification of Mr. Phillion at his trial as a significant component of the Crown's case when combined with the evidence of his confession to the police. Once the jury gave credence to her identification of him, it was likely to be a potent factor in their assessment of the truthfulness of his confession. Accordingly, it is important to review any undisclosed evidence that would have further undermined (or enhanced) Mrs. Roy's identification of Romeo Phillion.

(a) The Undisclosed Evidence Relevant to Mrs. Roy's Identification

327. The undisclosed police reports contain several statements by Detective McCombie that further undermined the reliability of Mrs. Roy's identification of Romeo Phillion. It should be borne in mind that McCombie had extensive dealings with Mrs. Roy. He showed her photographs for identification purposes on several occasions, and presented at least two in-person line-ups to her. He, therefore, had extensive familiarity with Mrs. Roy in this regard and, obviously, came to know her quite well.

328. On August 15, 1967, after Mrs. Roy had viewed the in-person line-up which included Romeo Phillion, McCombie wrote in his investigation report:

"It is felt by the writer at this time that there is *very little chance* of the deceased's wife, Mildred Roy, identifying the person responsible, if she were to view more line ups but every effort will be made to apprehend the person responsible for this crime and the investigation will continue." (emphasis added)

Investigation Report of McCombie, Aug. 15/67, Record, Vol. 2, Tab 28

329. On September 8, 1967, McCombie wrote in an investigation report:

Mrs. Mildred Roy has been shown several groups of photographs on various dates and she has not yet made an identification of a likeness or similarity to the person she saw on the day of the murder.

.....

It is the opinion of the writer that Mrs. Roy is in a very confused state of mind and I also feel she will be of *very little value* in making an identification should the murder suspect be apprehended. (emphasis added)

Investigation Report of McCombie, Sept. 8/67, Record, Vol. 2, Tab 37

330. On April 12, 1968, McCombie wrote in his 8:00 p.m. investigation report:

“It is felt by the writer that Mrs. Roy will never be able to identify the person who killed her husband and every picture that is shown to her she makes a comment that there is a similarity but she wished that she could see the person in reality. It is felt by the writer that due to the mental capacity of the deceased’s wife, even if she did see the person responsible, she wouldn’t be able to identify him and even if she did this Dept. would be helpless in charging him with the murder unless there was corroborating evidence and the evidence of identification alone would come under very heavy attack in the Court *due to the fact that she has already identified someone and this was not the person.*” (emphasis added)

Investigation Report of McCombie, Apr. 12/68, Record, Vol. 2, Tab 76

331. On February 8, 1972, Huneault prepared an investigation report in which he stated:

“Also while in conversation with Mrs. Roy this date, she now appears to have a strong desire to attempt to identify the person responsible for her husband’s death, at this time requested to view a photograph of Romeo Phillion, however this was denied her. Mrs. Roy indicates that her memory is gradually improving, that she was very nervous during the time of the incident to her husband, that she was under doctor’s care for her nerves, however that she has been improving greatly and now felt prepared to write out a witness statement as to her actions and observations on the date in question in 1967, which will be available to us in the next several days.”

Mrs. Roy testified at the preliminary hearing that she asked for another lineup to be arranged with Mr. Phillion in it after his arrest. Presumably Mrs. Roy was not permitted to see a photograph because Huneault appreciated that any attempted identification by Mrs. Roy was pointless by this time. The jury should have been told this because it was some time before Mrs. Roy made an in-dock identification of Mr. Phillion at the preliminary hearing and at his trial, identifications on which the Crown relied at trial.

Investigation Report of Huneault, Feb. 8/72, Record, Vol. 2, Tab 110
Evidence of Mrs. Roy, Preliminary Hearing, Vol. 2, 131/40 to 135/20

Conclusion

332. Detective McCombie's opinion, expressed on several occasions in his investigation reports, that any eyewitness identification by Mrs. Roy was bound to be unreliable would have been helpful to the defence in discrediting her identification of Mr. Phillion as the intruder. This is particularly true of his comments in his April 12, 1968 report. Thus, Mr. Cogan argued at trial that Mrs. Roy's in-dock identification should be ruled inadmissible because, in the circumstances of her previous attempts at identification, it was of "so little weight that it ought not to go to the jury by virtue of its prejudicial effect". Van Camp J. ruled the evidence admissible. She said:

"The question of whether there should be admitted the evidence of Mrs. Roy as to the identification of the man that she saw at the head of the stairs has presented me with some real difficulty, but I am, in my discretion, ruling that the evidence is admissible."

Her ruling may well have been different if she had heard the opinions that McCombie was expressing in 1967 and 1968. Huneault's decision in 1972 not to allow Mrs. Roy to see a photograph of Mr. Phillion would have provided further justification for not admitting her identification evidence at the trial.

PART 5**DID ROMEO PHILLION MURDER MR. ROY?*****Introduction***

333. Without evidence that Romeo Phillion had confessed Mr. Roy's murder to Neil Miller and the police, there would arguably not have been a *prima facie* case against him at his trial.¹²⁴ A confession to any crime, especially a crime as serious as murder, is bound to be accorded great, if not decisive, weight by a jury. In fact, it is likely to render any other aspects of the trial superfluous. In Phillion's case, the likelihood that the jury would accept his confession as true was compounded because he not only confessed to the police but also to his friend and lover, Neil Miller.

334. In *Wigmore on Evidence*, it is said:

“[t]he confession of a crime is usually as much against a man's permanent interests as anything well can be; ... no innocent man can be supposed ordinarily to be willing to risk life, liberty, or property by a false confession. Assuming the confession as an undoubted fact, it carries a persuasion which nothing else does, because a fundamental instinct of human nature teaches each one of us its significance.” (quoted by Arbour J.A. in *Oickle* in her dissent at 384)

In *Oickle*, Iacobucci J. for the majority said:

“...it may seem counterintuitive that people would confess to a crime that they did not commit. And indeed, research with mock juries indicates that people find it difficult to believe that someone would confess falsely. ...

However, this intuition is not always correct. A large body of literature has developed documenting hundreds of cases where confessions have been proven false by DNA

¹²⁴ An argument could be made that Mrs. Roy's dock identification of Mr. Phillion was enough evidence for a *prima facie* case that he committed the murder.

evidence, subsequent confessions by the true perpetrator, and other such independent sources of evidence.”

Iacobucci J. cited nine journal articles to support these propositions. As will be argued (*infra*), much has been learned about false confessions since Mr. Phillion’s trial in 1972.

R. v. Oickle (2000), 147 C.C.C. (3d) 321 (S.C.C.) at pp. 341 and 384

335. As a consequence of Mr. Cogan’s efforts, the jury had some basis on which to find that Mr. Phillion’s confession was false. The combination of the evidence of Dr. Arboleda and Dr. Girodo provided this. The jury knew that part of Phillion’s typed confession did not accord with the known facts; especially his claim that he had broken into an apartment in the building and stolen a knife. The jury knew that he had repudiated his confession within 6 ½ hours to P.C. Couture, and that he had confessed to Huneault and Nadori because he “wanted to get even and send them on a wild goose chase”. They knew something of Phillion’s dependent relationship with Neil Miller.

336. However, at Phillion’s trial, the confession did not stand alone. There was other evidence that provided substantial support.

(a) An Analysis of the Verdict at Trial

(i) ***The Defence concession that Mr. Phillion was in Ottawa at the time of Mr. Roy’s murder***

337. As far as the defence knew in 1972, the evidence that Romeo Phillion was still in Ottawa the night of August 9, 1967, several hours after the murder, was compelling. In fact, it was so compelling that Mr. Cogan, having referred to a possible alibi defence at the preliminary hearing,

conceded at Phillion's trial that he was in Ottawa during, and several hours after, the murder. In a handwritten draft "cross-examination of accused", Mr. Lindsay included as an area of questioning:

"admission that he was in Ottawa on Aug. 9"

As well, counsel, in their closing addresses, spoke as if they expected the jury to assume that Mr. Phillion was in Ottawa that evening. For example, Mr. Cogan told the jury:

"Now, the Crown led evidence that on the day of August 9th, the accused was seen by Mrs. Brazeau, he was wearing a pair of jeans."

In context, Mr. Cogan must have been referring to the evening of August 9 when he believed Mrs. Brazeau saw Mr. Phillion.¹²⁵ The Crown, in his closing, made the same assumption. He told the jury:

"For instance, a large part of [the confession] is supported by something you heard from Neil Miller; a large part of it is confirmed by Mrs. Barbe and Constable Bolger, who found him in New Liskeard, Ontario, and that is where the accused said he went around eleven-thirty that night, and Mrs. Barbe, you will remember, mentioned that she saw him around eleven-thirty and he left."

The issues at trial, therefore, were reduced to the reliability of Mrs. Roy's in-dock identification of Phillion as the intruder, and the truthfulness of his confessions to the police and Neil Miller.

Defence Closing, Vol. 6, 1250/10
Crown Closing, Vol. 6, 1271/25-30
Crown's handwritten notes, Record, Vol. 12, Tab 2

338. The Crown's juxtaposition of Mrs. Barbe's evidence that Mr. Phillion told her husband of his intention to go to New Liskeard, and Mr. Phillion's confession in which he told the police that he went to New Liskeard after the murder, was also raised in Van Camp J.'s charge. She said:

¹²⁵ Mr. Cogan's rendition of this part of Mrs. Brazeau's testimony was inferentially correct in that she had testified that she recalled seeing Mr. Phillion talking to Mr. Barbe on a day Mrs. Barbe identified as Wednesday.
Evidence of Marie Brazeau, Vol. 4, 790/35 to 791/20

“Again, in [Phillion’s] statement there is some corroboration there, some confirmation in what he says, that he said “Around eleven-thirty that night I went to Toronto and to New Liskeard,” and there is the evidence of Mrs. Barbe and Constable Bolger that, in fact, he did go to New Liskeard; Mrs. Barbe, in the conversation with her husband, in that he said he wanted to go to New Liskeard that night, and Constable Bolger that on August 11th he saw the car near the police station and spoke to the accused, who said he was waiting until morning as he was uncertain where his brother, Donald, was.”

It can, therefore, be seen that, from the Crown’s perspective, the importance of Mrs. Barbe’s evidence was not only that she placed Phillion in Ottawa after the murder – which was taken as a given – but also that her evidence provided support for a finding that Phillion’s confession was true.

Charge to Jury, Vol. 6, 1293/40 to 1294/10

339. The evidence and disclosure available to Mr. Cogan in 1972, without exception, supported the conclusion that Phillion was speaking to Mr. Barbe outside his building hours after the murder.

- Mrs. Barbe, who testified at the trial and at the preliminary hearing, was sure that she saw him after bingo night on Wednesday evening, August 9. The defence also had a chance to see her handwritten statement which she gave to the police on January 13, 1972 which related the same thing.
- Mr. Barbe was not called by the Crown at trial, likely because the defence was conceding that Phillion was in Ottawa on Wednesday night. In his willsay, he said that he spoke to Phillion as his wife was coming back from her Wednesday bingo. At the preliminary hearing, Mr. Barbe testified that he spoke to Mr. Phillion from his verandah on

“... a Wednesday, when [my wife] came back from the bingo.”

He further testified that his wife had been playing bingo for five or six years, always on Wednesdays.

Willsay of Mr. Barbe, Record, Vol. 13, Tab 28

Evidence of Mr. Barbe, Preliminary Hearing, Vol. 4, 330/20, 331/40-50

- Marie Brazeau testified that she saw the encounter between Mr. Phillion and Mr. Barbe but she was unable to recall what day of the week it was.
- Gail Brazeau testified at the preliminary hearing that she saw Mr. Phillion and Mr. Barbe talking one evening but could not fix the day precisely. In her January 24, 1972 statement to the police, to which Mr. Cogan probably gained access (see paragraphs 322 to 323 *supra*), she timed it in a way consistent with her having seen them on the Wednesday.
- On August 11, 1967, between midnight and 1:00 a.m., P.C. Bolger of the New Liskeard police woke up Phillion as he was sleeping in his car which was parked half a block from the New Liskeard police station. If Phillion had left Ottawa on Thursday morning, August 10, he could have arrived in New Liskeard that evening. In these circumstances, Bolger's evidence was not inconsistent with the claim that Phillion was still in Ottawa on the Wednesday evening.¹²⁶

Mr. Cogan did not know that contained within the Barbes' evidence was a clue that Mr. Barbe spoke to Romeo on Tuesday evening, because of Phillion's reference to the traffic ticket he had received earlier "that" day. In light of Mr. Cogan's knowledge at the time of Phillion's trial, the evidence that he spoke to Mr. Barbe on the Wednesday evening must have appeared overwhelming, and would account for the abandonment of his suggestions at the preliminary hearing that Phillion was not in Ottawa on Wednesday afternoon, and had an alibi for the murder.

¹²⁶ Mr. Cogan would not have seen P.C. Brown's undisclosed report of January 17, 1972 in which he suggested that Phillion may have arrived in New Liskeard in the early morning hours of Thursday, August 10 (see paragraph 202 *supra*).

(ii) *Mrs. Roy's identification of Mr. Phillion as her husband's assailant, and his confession to the crime*

340. In his closing address, the Crown relied on Mrs. Roy's identification of Mr. Phillion as the intruder. He explained that he was "relying on three things. First of all, the identification of Mrs. Roy..."¹²⁷ He submitted that she had had three separate opportunities to see the intruder, and that her description of the man was a "fairly accurate" description of Mr. Phillion. He referred to both the August 10 photo line-up and her initial "positive identification" on August 15. Mr. Lindsay continued:

"Now, my learned friend has said to you, "Well the Crown is going to urge you to rely on her identification." That is not quite the case, gentlemen. If that were the only evidence in this case I could not ask you to place very much weight on it at all. I am not urging you to rely on that evidence, but rather I am asking you to consider with what I am about to discuss with you – not to discard it altogether, but to keep it in your minds and give it what weight you feel is proper.

Her evidence, however, gentlemen, as you have heard, is not the only evidence in this case, not by a long shot, and you have heard from Detective Huneault that Mr. Phillion was taken into the police station on January 11th, 1972 and there he confessed to this particular crime. Now, it is your function, gentlemen, to look at the surrounding circumstances of the confession and to decide on what weight you are going to give it. You have to decide whether, in your submission, whether it is a true statement, a true confession to this matter."

Mr. Lindsay then submitted that Mrs. Roy's identification evidence supported the reliability of Phillion's confession and *vice versa*.

Crown Closing Address, Vol. 6, 1264/40 to 1266/30

341. In her charge to the jury, Van Camp J. began by referring to Mrs. Roy's identification as part of "the crux of this case":

¹²⁷ The other two "things" were Phillion's confession to the police, and his confession to Miller. See Defence Closing, Vol. 6, 1248/30-40

“We then come to really *the crux of this case* and that is that we have a culpable homicide, but was it by the accused and in order to establish that it was by the accused the Crown, which must prove it beyond a reasonable doubt, must depend upon, (1) the identification by Mrs. Roy and the evidence of Mrs. Roy; (2) the statements of the accused; (3) the evidence of the witness, Miller. That is the only evidence which connects the accused with this crime.” (emphasis added)

Charge to Jury, Vol. 6, 1285/10 to 1290/40

(iii) *The significance of Mr. Phillion’s failure to testify in his defence*

342. It cannot be known whether Mr. Phillion’s failure to testify in his defence influenced the jury’s verdict. It must have been a comparatively easy decision for the defence to make.¹²⁸

Apparently, Phillion was no longer denying that he was in Ottawa on the Wednesday evening, and seemingly had no explanation for his whereabouts in the afternoon. Dr. Girodo and Dr. Arboleda testified that they would place little or no credit on anything he had to say. Thus, as Dr. Arboleda testified:

“I would not consider him a trustworthy person.”

It would be unwise to call a client with this kind of advance billing.

Evidence of Dr. Arboleda, Vol. 6, 1231/27

¹²⁸ Between the close of the Crown’s case and the calling of a defence, Mr. Cogan, in the absence of the jury, spoke of having to decide whether to call his client as a witness, referring to it as “the most difficult [decision] in any criminal trial.”
Trial Transcripts, Vol. 5, 1061/1

343. Phillion also had a lengthy criminal record. At the time of his trial, his record was:

1955-12-08	Theft	18 mos susp sent
1956-04-26	Assault	10 days
1957-09-15	Theft	Time in jail from 1957-07-26
1957-09-12	Theft by Conversion	2 mos
1958-10-02	(1) Theft	(1) 3 mos
	(2) Theft of Auto by Conversion	(2) 6 mos conc
1961-01-26		Paroled
1961-06-22	Theft	2 yrs
1963-08-01	Receiving	2 mos
1964-06-16	(1) Procuring (x2)	2 yrs each charge conc
	(2) Live on Avails of Prostitution	
1968-04-19	(1) Live on Avails of Prostitution	(1) 3 yrs
	(2) Assault	(2) 1 yr conc

In 1972, the law was settled that a trial judge had no discretion under section 12 of the *Canada Evidence Act* to prevent a jury from hearing an accused's entire criminal record once he elected to testify.

Criminal Record of Romeo Phillion, Record, Vol. 4, Tab 41
 Criminal Record of Romeo Phillion, Record, Vol. 13, Tab 51
 See *R. v. Stratton* (1978), 42 C.C.C. (2d) 449 (Ont. C.A.)
Hewson v. The Queen (1978), 42 C.C.C. (2d) 507 (S.C.C.)
R. v. Corbett (1988), 41 C.C.C. (3d) 385 (S.C.C.)

344. In 1996, Mr. Cogan replied to (unsubstantiated) accusations that Mr. Phillion had made about him to the Department of Justice and, in his response, explained why he did not call Phillion as a witness in his own defence. Mr. Dale of the Criminal Conviction Review Group reported as follows:

“[Mr. Cogan] ... stated that he had gone to great lengths to lead exculpatory evidence, even to the extent of calling the “inventor” of the polygraph, Dr. John Reid of Chicago. Mr. Cogan stated that it would have been totally incongruous for him to suppress any exculpatory evidence and he invited departmental counsel to ask members of the local bar to confirm his reputation for aggressively pursuing the defence of his clients. He advised that he likely did not call the applicant to testify because of his criminal record, the fact that he had led police to the scene of the murder, and he admitted to Neil Miller that he had murdered Mr. Roy. He attempted to put the exculpatory results of the polygraph in “by the

back way” without calling the applicant, as part of the basis for the psychological opinion that the applicant would have falsely confessed to police about committing the Roy murder so as to draw attention to himself. He advised the applicant not to take the stand and the applicant accepted the advice.”

Draft Investigation Brief, Record, Vol. 15, Tab 15

345. In the circumstances, defence counsel’s decision not to call his client was understandable. Anything said by him was no more reliable then than it is now. In his recent psychological assessment of Mr. Phillion, Dr. Turrall aptly calls him “an unreliable historian”. It is for this reason that we have sought to avoid relying on Mr. Phillion’s memory as a dependable source of information for this brief.

(iv) The jury’s verdict

346. In the circumstances, Mr. Phillion’s conviction for the non-capital murder of Mr. Roy was to be expected. As the Crown told the jury in his closing, Mrs. Roy’s eyewitness identification was supported by Phillion’s confession, and any doubts about the latter was, in turn, supported by the former. The Crown concluded his closing address by saying:

“So gentlemen, in conclusion then, what your duty is, is you have to consider the confession, you have to consider all the circumstances under which it was made and you have to consider whether it would be true or not; what evidence is there before you throughout this whole trial that he lied to the detectives? You have heard evidence that he is normally a liar, habitually lies, the psychiatrist and psychologist that same before you indicated that he does at times tell the truth and, in my submission, when he gave the confession to the Ottawa Police Department, I am urging you, gentlemen, to believe that at that particular time he was telling the truth to the police.”

The jury was told to accept that Phillion was in Ottawa before, during and after the murder. They heard evidence that he was loitering, or hanging around, within blocks of the apartment building

hours after the murder had taken place. Mrs. Brazeau lived at York and Nelson Streets, 500 metres from 275 Friel Street; the Barbes lived next door to the Brazeaus. On the limited knowledge available to the jury, Phillion's confession to the police, and to Neil Miller, Mrs. Roy's identification of him, and his presence in the immediate vicinity of the murder can only have led to one conclusion – his confession was true.

Crown Closing, Vol. 6, 1266, 1272/40 to 1273/15

**(b) Romeo Phillion is Now Known to have been
in Trenton around the Time of the Homicide**

347. The police reports of 1967 and 1968, as well as many of the police reports in 1972, the statements of all relevant witnesses, and the facts now known of the traffic ticket Phillion received on Tuesday, August 8, all help prove that the contents of Detective McCombie's report of April 12, 1968 were accurate – Phillion was in or near Trenton within one or two hours of the homicide, on his way to Toronto, and could not have committed the crime.

(i) *Mr. Phillion left Ottawa on the Tuesday night or Wednesday morning*

348. With the benefit of the archival disclosure, it is now known that, of all the witnesses interviewed who saw Mr. Phillion in Ottawa, none claimed in their 1967 interviews to have seen him after the evening of Tuesday, August 8. It is only in 1968, when the New Liskeard police conducted their investigation, and 1972, when the Ottawa police followed up on Phillion's confession, that these witnesses first purported to have seen Phillion on Wednesday, the day of the

homicide. The Crown only disclosed to the defence what the witnesses had to say in 1972, and even in this regard disclosure was only partial.

- Mr. Barbe told McCombie on August 11 and 14, 1967 and, again, in April, 1968 that he spoke to Phillion about selling his car on *Tuesday* night. August 14 was a key date in the investigation, as McCombie was waiting to see whether Mrs. Roy would identify Phillion as the culprit the next day. Four and a half years later, on January 12 and 13, 1972, during interviews with Huneault and Nadori, Mr. Barbe was reported as having said, for the first time, that he spoke to Phillion on *Wednesday* night. It is interesting to note that, in his investigation report, Huneault made no mention that Mr. Barbe's memory had changed from 1967. Mr. Barbe subsequently testified at the preliminary hearing that he spoke to Phillion on *Wednesday* night.

Investigation Report of McCombie, Apr. 12/68, Record, Vol. 2, Tab 75, p.2
Statement of Paul Barbe, Jan. 13, Crown Brief, Record, Vol. 13, Tab 42

- The evidence establishes that Mrs. Barbe also told McCombie on August 11, 1967 (and quite probably on August 14) that she saw Phillion talking to her husband on *Tuesday* night (McCombie testified at the preliminary hearing that he spoke "with neighbours next door, a family by the name of Barbe"), and likely spoke to her again in April, 1968 when he re-interviewed her husband. Four and a half years later, on January 12 and 13, 1972, during interviews with Huneault and Nadori, Mrs. Barbe was reported as having said, for the first time, that she saw her husband talking to Phillion on the *Wednesday* night. Once again, there is no mention in the investigation report that Mrs. Barbe's memory had changed from 1967. Mrs. Barbe subsequently testified at the trial that she saw her husband speaking to Phillion on *Wednesday* night.

Investigation Report of Huneault, Jan. 13/72, Record, Vol. 2, Tab 98
Evidence of Marie Barbe, Vol. 4, 316, 317
Evidence of McCombie, Preliminary Hearing, Vol. 4, 341/35-50

- In 1967 and 1968, the Barbés did not frame their memories around bingo night. In 1972, Mr. and Mrs. Barbe framed their memories around it being *Wednesday* night that Mr. Barbe spoke to Phillion because they remembered it had occurred on a night that Mrs. Barbe had

played bingo, and she only played bingo on *Wednesdays*. It is now known that during July and August bingo was also played on *Tuesdays*.

- Both Mr. and Mrs. Barbe remembered that Phillion told Mr. Barbe that he had received some kind of traffic ticket that afternoon. It is now known that Phillion received a ticket on *Tuesday* afternoon.
- Gail Brazeau told Detective McCombie on the key date August 14, 1967 (and likely on August 11 and 13, 1967) that she last saw Phillion at 11:00 p.m. on *Tuesday*. It is unlikely that Phillion remained in the area into Wednesday afternoon and evening without Gail seeing him. Commencing April 4, 1968, when she was interviewed by the New Liskeard police, Gail's memory changed – she now remembered that she had last seen him from a window of her mother's house between 1:00 and 2:00 p.m. on *Wednesday*. Extraordinarily, this was, as the New Liskeard police would have known, only 45 minutes before Mr. Roy's murder. Thereafter, during a series of interviews with Huneault and Nadori, Gail's memory continued to change. She began to “remember” more events that were incriminating to Phillion, and ultimately remembered seeing him on Wednesday *evening* speaking to Mr. Barbe.

Statement of Gail Brazeau, Record, Vol. 2, Tab 73

- Gail's mother, Marie Brazeau, “was questioned at length and on several occasions” by McCombie in August, 1967. She told him that she had seen Phillion driving around sometime on *Tuesday* evening, and had not seen him since. Mrs. Brazeau first changed her story in April, 1968. McCombie spoke to her as a part of his response to the New Liskeard investigation, and she told him for the first time that she had seen Phillion *on the day of the murder*. She claimed that Phillion told her that he had found an apartment on *Friel Street*¹²⁹ for himself and Gail to live. McCombie discounted this new claim in his report, noting that she had said none of this in 1967. It should also be noted that, by this time, Romeo Phillion and Gail Brazeau were not getting along, and the idea that Phillion may have found an

¹²⁹ Mr. Roy's murder, of course, occurred at an address on Friel Street.

apartment for them both to live in is antithetical to this, and to the fact that he left Ottawa on all versions by August 9. When spoken to on January 14, 1972 by Huneault and Nadori, Mrs. Brazeau was reported as having told them, in varying stories, that she saw Phillion on *Wednesday*. In her testimony at the trial, she remembered that she saw Romeo and Mr. Barbe talking outside but could not remember on which day of the week.

Investigation Report of McCombie, Apr. 12/68, Record, Vol. 2, Tab 75

349. No credence can be placed on the post-1967 statements of the Barbes and Brazeaus insofar as they claim that they saw Phillion in Ottawa on Wednesday. Original statements made shortly after an event on mundane matters such as the day of the week that an event occurred are always more likely to be reliable than statements given weeks, months or years later in contradiction. As has been explained, Mr. and Mrs. Barbe, and probably both Brazeaus, were first interviewed on August 11, 1967, and again on August 14, when McCombie believed Phillion to be the prime suspect. He had first been named as a possible suspect on August 10, and had been picked out with his twin by Mrs. Roy on the same day. He was arrested in New Liskeard on August 13 and returned to Ottawa. McCombie would, therefore, have been intently interested in whether the Barbes or the Brazeaus could place Phillion in Ottawa on Wednesday when he questioned them on the two dates in August, 1967. Apparently they could not. The combination of their statements, and the information he obtained in Trenton, explain why he was able to confidently assert Phillion's innocence in response to New Liskeard's suspicions in April, 1968.

350. The contents of Gail Brazeau's interview with the New Liskeard police, and the contents of the interviews of Gail Brazeau and the Barbes by Huneault and Nadori, are not credible in their later claims to have seen Phillion on Wednesday for another reason. When studied individually and as

a whole, they more likely reflect police-induced confabulation. Huneault and Nadori, for example, may have directly or indirectly told the Barbes and Gail Brazeau that (a) Mr. Roy had been murdered on Wednesday, (b) Phillion had now confessed to the murder and (c) the police were looking for any information that could help prove Phillion was in Ottawa on the day of the murder. The *bona fides* of the police, especially Huneault and Nadori, are brought into question by the highly “convenient” contents of the witnesses’ new statements in 1972, by their failure to point out in their reports that the witnesses’ claims to have seen Phillion on the Wednesday were new, and by their failure to ensure that any of the 1967 statements were disclosed to the defence at trial.

A. *P.C. Dupras’ investigation report of August 11, 1967*

351. On Friday, August 11, 1967, P.C. Dupras was searching for weapons in the Friel Street area.

He spoke to several citizens. He prepared an investigation report as follows:

“1st: person which I spoke to was Roger Desormeaux, 139 Creighton St., Tel 745-4696 who stated this vehicle 1958 convertible red black top with tire in the back covered with red covering had been parked on the lot in the back of 200 Friel St. The lot is situated facing washing building which is on Rideau St. also go back West toward the building ...

This person stated the car had been parked Wednesday afternoon around 1 p.m. when he was coming back from his lunch to go to work in which he is cleaning the window on Friel St.

The other person concerned was store owner at the corner of Nelson 79 Nelson St. This person which is Fern Cote and his wife Hugette stated they seen this car for approx 2 to 3 days this week last time they seen this vehicle was approx Wednesday afternoon. They also stated the car had not been seen since. The tel number of these person 235-0065. These person also Mr. Withmore and his daughter Linda Withmore of 257 York St., Apt 306 also stated they seen the same car around this time, also investigated to Mr. Leo Kelly of 255 York St., Apt(3) 203 who stated he could testify that he had seen this car previously on Tuesday and Wed. afternoon all afternoon.

At 200 Friel St. I talked with Mrs. Tel 233-1069 who stated she worked at the Post Office and drives a white car and also stated occasionally this convertible red fitting the description would park beside her. This man Les Kelly of 255 York St. stated this man was living at 248 York St.”

The car description matched that of Phillion’s car, and Mrs. Brazeau lived at 248 York Street.

Investigation Report of Dupras, Aug. 11/67, Record, Vol. 2, Tab 18
 “Re Trial: Additional Witnesses”, Record, Vol. 12, Tab 4

352. There was no follow-up on this report. None of the named civilians were again referred to in any police report. No willsays were prepared for any of the civilians. P.C. Dupras’ name does not appear in the Crown brief. No witness statements were in the archives which related to the contents of Dupras’ investigation report.

353. The only other reference to Dupras’ report is found in a document from the archives, in Mr. Lindsay’s handwriting. It reads as follows:

“Re Trial:

Additional Witnesses:

Mrs. Phillion
 Mr. Lacasse
 Service station operator near Trenton
 Maurice Langlois
 Fernand Karouac

– someone from garage McConnell Motors¹³⁰ where Donald worked to id time card

¹³⁰ Mr. Lindsay was mistaken about the name of Donald’s place of employment – it was “Connelly Motors”.
 Investigation Report of McCombie, Record, Vol. 2, Tab 26

- witnesses re red convertible:
 - Roger Desormeaux
 - Hugette and Fern Coté
 - Linda Withmore
 - Mr. Withmore
 - * Leo Kelly – saw red convert
 - owner lived at 248 York

Someone to give evidence re picture in paper – when it appeared & how many times”.

From this handwritten list, it can be inferred that Mr. Lindsay had a copy of P.C. Dupras’ investigation report, and made out a list of the witnesses contained therein in preparation for a defence being led by Mr. Cogan that Mr. Phillion left Ottawa before the murder occurred.

“Re Trial: Additional Witnesses”, Record, Vol. 12, Tab 4

354. The significance of P.C. Dupras’ report is that he claimed that some of the witnesses purported to have seen Phillion’s car in Ottawa on Wednesday afternoon which, if true, contradicted his Trenton alibi and meant that he was in Ottawa at the time of the murder. Yet Detective McCombie presumably read the report, and not only failed to mention its potential significance in any of his own reports but also had discounted its contents by, at the latest, April 12, 1986 when he wrote his response to the New Liskeard police investigation. In the absence of any witness statements from the people named in the report, in the absence of any further reference to them in later police reports, and in light of the failure of Huneault or Nadori to follow-up on them as a part of their 1972 investigation, there is little more that can be said about Dupras’ report. Mr. Cogan would have been unaware of its existence, its contents and the witnesses. Its contents cannot be meaningfully investigated in 2003. In all these circumstances, no weight can be placed on the report’s contents.

B. *Three Further “Additional witnesses” Listed by The Crown*

355. In his handwritten list entitled “Re Trial Additional witnesses,” Mr. Lindsay listed three witnesses Mrs. (Yvonne) Phillion, (Maurice) Lacasse and Maurice Langlois, who require comment. Mrs. Phillion is Romeo’s mother; Maurice Lacasse was Francoise Phillion’s husband in 1967 and still was in 1972; Maurice Langlois was married to Gail Brazeau’s sister.

Maurice Langlois

356. The significance of Mr. Langlois in the minds of the Ottawa police in 1972, and presumably Mr. Lindsay, is evident from his inclusion in the “to do” list in Detective Huneault’s January 13, 1972 investigation report which was created following his meeting with McCombie, Nadori and Norton on January 12, 1972:

“Item 8, interview the brother-in-law of [Gail] Brazeau , Marcel [*sic*] Langlois, who according to Gail BRAZEAU was in conversation with PHILLION on the day of the murder on York St.”

This was a reference to an August 13, 1967 report by Detective McCombie in which he recorded a telephone call received from Gail Brazeau two days earlier:

“On Aug. 11/67 at approx. 11:30 p.m. a telephone call was received from Gail Brazeau at 248 York St. who stated that she had further information pertaining to this occurrence. After interviewing this witness she states that on the 9 of Aug. *she recalls that Romeo had a conversation with her brother in law one Maurice Langlois and that they were whispering out side her house about something which she did not know* and states that Langlois had lived in the area of Laurier and King Edward and since had moved to a house on Lowry in the west end of the city.” (emphasis added)

It should be noted that in his April 12, 1968 investigation report, McCombie recorded that he had spoken to Gail again on August 14, 1967 at which time she told him:

“the last time she saw Romeo Phillion was around 11:00 p.m. on the night of August 8, 1967 and that she had not seen him since that time.”

This confusion in dates has already been commented on (*supra*, paragraph 316).

Investigation Report of McCombie dated April 12, 1968, Record, Vol. 2, Tab 75
 Investigation Report of Huneault dated January 13, 1972, Record Vol. 2, Tab 98
 Investigation Report of McCombie dated August 13, 1967, Record, Vol. 2, Tab 25

357. Nadori and Huneault followed up and interviewed Maurice Langlois on January 14, 1972.

Huneault wrote in his January 14, 1967 investigation report:

“An attempt was made to pinpoint the whereabouts of Phillion on the date in question. However the only evidence obtainable was that [Langlois] was aware that Phillion was in Ottawa on or about that date however [he] could not pinpoint it any closer.”

A copy of a statement signed by Mr. Langlois is in the archives. In it, he said:

“I don’t know what day or date Romeo and Gail came to Ottawa, but I am sure that Romeo stayed for at least 2 or 3 days, after. I saw him the first day he arrived, the next day I worked on my car, my ignition switch was not working right, and I saw Romeo on the day after that, on the verandah at Mrs. Brazeau’s. I spoke to him that is when he told me that old Mr. Brazeau was too cheap to give a meal to someone who was hungry.”

Investigation Report of Huneault dated January 14, 1972, Record, Vol 2, Tab 101
 Statement of Maurice Langlois, Record, Volume 14 Tab 5

Yvonne Phillion

358. As in the case of Maurice Langlois, Mrs. Phillion’s inclusion in Mr. Lindsay’s list may also have resulted from her inclusion on Huneault’s January 13, 1972 “to do” list. Huneault wrote:

“Item 9, possibly reinterview Mrs. PHILLION the accused’s mother, in relation to the day of the arrival of the accused in New Liskeard, Ont.”

Certainly, it was important to try and ascertain the date of his and Gail's arrival in Ottawa. Later on January 13, Nadori and Huneault interviewed Mrs. Phillion where she was now residing in Ottawa. She told them that she had visited her son at the County Jail that day and he had told her that he was innocent of the murder. Nadori's report continued:

“We attempted to converse with Mrs. Phillion relating to events that preceded the arrest of Romeo on August 13, 1967 in New Liskeard, however she apparently has no accurate recollection of the circumstances concerned.”

Investigation Report of Nadori, Jan. 13/72, Record. Vol. 2, Tab 99, p. 3
Investigation Report of Huneault, Jan. 13/72, Record. Vol. 2, Tab 98

359. Mrs. Phillion's inclusion on the list may also stem from a January 14, 1972 interview of her by Detectives Huneault and Nadori. Huneault wrote:

“As a result I proceeded to 46 Nelson St. and had a conversation with Mrs. Phillion in the presence of her common law husband Alphege Courschesne in which she related that on Wednesday the 12th day of Jan. this year, that her daughter, Mrs. Francoise Topping of married name, presently known as Francoise Lacasse, living at 279 Guiges St. with her common law husband Maurice Lacasse, as a result of the telephone call that Mrs. Phillion had been looking at a newspaper clipping and discussing the contents of the clipping [with] Mrs. Lacasse, Mrs. Phillion indicated that they have not found the knife indicating the murder weapon, to which Mrs. Lacasse indicated: “Mother, you know the knife was thrown in the garbage,” and on thinking of this, conversation this date, she was persuaded by her common law husband to call the department as this may have some bearing on the case.”

The report continued:

“Mrs. Phillion was questioned at length in relation to the tone of voice and possible expression if any of Mrs. Lacasse when she uttered these words and Mrs. Phillion indicated that to her knowledge it appeared that Mrs. Lacasse had some knowledge of the murder weapon.

Mrs. Phillion at this time appeared anxious to have us interview Mrs. Lacasse and she was advised that this would be done at our earliest possible convenience.”

Investigation Report of Huneault dated Jan. 14/72, Record, Vol. 2, Tab 101

360. Since Mrs. Phillion attempted on several occasions to assist Romeo while he was in custody in 1972, this suggests that Mrs. Phillion thought Ms. Lacasse had information that likely exculpated Romeo.¹³¹ The detectives interviewed Francoise [Frances] Phillion on January 28, 1972, but apparently asked no questions of about the knife, but were interested in Romeo's whereabouts on the day of the homicide. Francoise was unable to help them in this regard.

Investigation Report of Huneault dated February 8, 1972, Record, Vol. 2, Tab 110

Maurice Lacasse

361. Mr. Lacasse's inclusion on Mr. Lindsay's list of potential trial witnesses can be explained. Gail Brazeau had told McCombie on August 11, 1967 that she and Romeo, upon their arrival in Ottawa, stayed with Frances and Maurice Lacasse, until Gail moved out and went to stay at her mother's, while Romeo continued to stay with them.

Investigation Report of McCombie, Aug. 13/67, Record, Vol. 2, Tab 25

362. Huneault and Nadori interviewed Mr. Lacasse either on January 27 or 28, 1972 (Huneault's report is confusing in this regard). Lacasse told them that he did not

“...keep too much company with [Phillion] as he did not like his type, he could not recall where he was residing at the time of the murder ..”

He continued that he:

¹³¹ This exchange with Francoise was likely the originating event for Mrs. Phillion's later statement to Jack Parish on July 17, 1992 that *Jean Paul* Langlois confessed to her that he had murdered Mr. Roy and that her daughter Frances (who was known as Francoise Topping, Francoise Lacasse and, later, Francoise Langlois) had admitted to hiding the knife in Mrs. Roy's kitchen (discussed paragraph 401 *infra*).
Statement of Yvonne Phillion, Record, Vol. 15, Tab 10

“...recalls going to the drive-in theater as stated by his wife, however suggests that the drive-in theatre was the Queensway Odeon Drive-in on the Montreal Road, where the three other persons in the vehicle had attempted to sneak into the theatre over the fence, however were observed and that he had to pay for the entrance fee.”¹³²

Mr. Lacasse never claimed to know whether Phillion was in Ottawa or not on the day of the murder.

Investigation Report of Huneault , Feb. 8/72, Record, Vol. 2, Tab 110

See also Investigation Report of Huneault, Jan. 23/72, Record, Vol. 2, Tab 108, p. 5

(ii) Mr. Phillion’s car broke down on Highway 401 near Trenton

363. It has already been submitted that it is reasonable to suppose that Phillion told McCombie after his arrest in New Liskeard, between August 13 and 15, 1967, that his car broke down on Highway 401 near Trenton as he drove to New Liskeard (via Toronto). McCombie would then have checked Phillion’s story with the service station in Trenton, likely within days of the event, either before or after Mrs. Roy viewed the lineup on August 15. This also explains how the New Liskeard police knew about the Trenton alibi when they questioned Gail Brazeau on April 4, 1968.

It can be reasonably inferred that the New Liskeard police likely had an Ottawa police report, drafted by McCombie, in its possession to this effect, a report that has never been located. It is also known that McCombie interviewed and re-interviewed the Barbes and the Brazeaus in this period.

¹³² The drive-in was initially mentioned by Gail Brazeau who said that when she and Romeo were staying with Maurice and Francoise Lacasses, the four of them went to a drive-in theatre in Cyrville and saw a horror movie. Gail Brazeau stated this happened on the last night she stayed with the Lacasses, and believed it had been a Sunday. Francoise Lacasse also remembered their visit to the Cyrville Rd drive-in and added the anecdote about her, Gail and Romeo attempting to sneak in and Maurice being forced to pay for their tickets. Investigation Report of Nadori dated January 25, 1972, Record, Vol. 2, Tab 109
Investigation Report of Huneault dated February 8, 1972, Record, Vol. 2, Tab 110

364. A total of four police reports confirmed Detective McCombie's belief that Romeo Phillion was not the culprit in Mr. Roy's murder:

- McCombie's own report of September 15, 1967 addressed to Detective Leppan of the North Bay Police Department,
- Detective Soucie's report of March 4, 1968 in which Soucie recorded that he was preparing the report "for Det. McCombie",
- McCombie's own two reports of April 12, 1968.

365. McCombie's belief on April 12, 1968 that Phillion was not responsible for the murder was also consistent with his conduct thereafter because, in the ensuing months, he personally investigated other suspects.

- In 1968, commencing on April 11, 1968, McCombie investigated one Robert Miner as a suspect in Mr. Roy's murder. McCombie personally interviewed Mr. Miner on June 20, 1968 and, unlike in Phillion's case, did not clear him as a suspect but noted that he

"...had insufficient grounds to hold this person any longer in regards to this..."

- In August and September, 1968, McCombie investigated one Pierre Ruel in connection with the murder. On August 23, 1968, McCombie wrote:

"Further inquiries at the moment are under way to see if we can definitely establish that Ruel was in Ottawa on the date of the murder Aug. 9 before we make any approaches to his wife or any other persons."

A further report from Detective Welsh of the Ottawa Police dated September 7, 1968, refers to Peter Ruel as a "possible suspect" in the case with inquiries to be made to see whether he could be shown to have been in Ottawa on the day of the murder.

366. When interviewed on February 5, 1999 by members of the *Innocence Project*, McCombie remembered speaking to the service station owner and remembered receiving the radio from him/her that Phillion had proffered as payment for fixing his vehicle. However, despite definitively stating in his April 12 reports that he accepted that this proved Phillion's innocence, McCombie told the students that it did not provide an alibi for Phillion:

“because the time of the repair indicated by the person allowed time for Phillion to return to Ottawa to commit the murder.”

With respect, this suggestion is unrealistic. *Why would Phillion have driven from Ottawa to Trenton, broken down, and then driven back to Ottawa?*

Affidavit of Stacey Taraniuk, Record, Vol. 15, Tab 5

367. The car radio incident has seemingly always left an impression on McCombie. On August 20, 1992, Jack Parish of *Summit Investigation Services* spoke to McCombie on the telephone. Mr. Parish reported on his conversation with McCombie as follows:

“This morning, I had a brief telephone conversation with Superintendent John McCombie of the Ottawa PD. Superintendent McCombie was on vacation when the Investigator was in Ottawa to interview Frances Phillion. [Detective McCombie] stated that the victim's widow, Mrs. Roy, had identified Romeo Phillion through the one-way glass at the initial lineup, after Romeo had been returned to Ottawa from New Liskeard. She was shaking very badly, and once she was brought into the room to face Romeo, she was too upset to provide a positive I.D. He stated that only one person was involved in the murder; that Mr. Roy was restraining the assailant, and told his wife to call the Police. He stated that Romeo was in Ottawa on the day of the murder, although he cannot recall the details. *He stated that he traced Romeo to New Liskeard, and established that Romeo had sold a car radio on his way to New Liskeard.* He also feels confident that all of the details would be in the trial transcripts. At the time that Romeo was arrested and charged with the murder in 1972, Superintendent McCombie had been promoted and was not directly involved in the investigation at that time. The investigator reminded him of Gail Brazeau's statement to the effect that Romeo was in the immediate vicinity of the murder site on the day of the occurrence *and he did recall the results of the followup that the Police must have made at the time (April, 1968).* He could not recall, nor could he recall anything about the 1967 investigation files been missing. He could not recall if the murder weapon was ever recovered. Superintendent McCombie has no doubts as to Romeo's guilt in the Roy murder.” (emphasis added)

Letter from Parish to Crane, Aug. 20/92, Record. Vol. 3, Tab F,1

368. Kirk Makin, the *Globe & Mail* reporter, reported November 8, 2001 on an interview he had with McCombie as follows:

“Mr. McCombie ... denied actually clearing Mr. Phillion in his 1968 report, saying he probably learned new information in 1971 that cast doubt on Mr. Phillion’s alibi.

‘I haven’t seen the goddamn report in 35 years’, Mr. McCombie said. ‘I have trouble just remembering what I had for dinner last night. I’d love to read the report and know the context.’

Mr. McCombie recalled that he was strongly persuaded of Mr. Phillion’s guilt after he saw what he believed to be blood on the suspect’s shoes a few days after the killing.

‘That evidence never came out, because the shoes were lost somewhere between me confiscating them and them getting sent to the RCMP lab’, he said.”

These remarks raise four issues.

- (1) McCombie’s April 12 reports do definitively clear Mr. Phillion of the homicide.
- (2) On April 2, 1971, McCombie had indeed written in a report that he believed Romeo Phillion had committed the murder but gave no explanation for his belief (see paragraph 256 *supra*).
- (3) Contrary to what he told Mr. Makin, McCombie had seen the April 12, 1968 8:00 p.m. report recently; it was shown to him when he was interviewed on February 5, 1999 by members of the *Innocence Project*.
- (4) McCombie’s claim to have seen blood on Phillion’s shoes was reported by him in his August 13, 1967 investigation report. Phillion was arrested in New Liskeard on August 13, 1967. McCombie wrote in his report:

“After questioning Romeo Phillion in the New Liskeard police station we then removed his clothes that he was wearing. A close examination of the right shoe showed a sticky substance on the tope which may possibly be

dried blood. The pair of shoes along with a black pair of pants his socks and a black shirt were placed in a plastic bag and were conveyed back to Ottawa where they will be turned over to the lab for expert examination on August 14/67.”

No submission report to a laboratory, or a report from a laboratory, has ever been produced in this regard.

Investigative Report of McCombie, Aug. 13/67, Record, Vol. 2, Tab 26
Globe & Mail article, Nov. 8/01, Record, Vol. 7, Tab 50

369. On November 9, 2001, Aaron Sounds of the *Ottawa Citizen* reported as follows:

“In an interview yesterday, Mr. McCombie said the group is taking the 1968 report regarding Mr. Phillion’s supposed alibi out of context.

He said Mr. Phillion was one of several suspects at the time and was questioned by police in New Liskeard where he was visiting relatives.

‘They’re taking out of context a report I probably made after a conversation with the New Liskeard police when we had asked them to question him regarding the murder’, said Mr. McCombie, now a member of the Police Services Board. ‘We proved it wasn’t true.’

Mr. McCombie said the investigation revealed Mr. Phillion ran out of gas near Trenton after he committed the murder. ‘We had witnesses who put him Ottawa at the time of the murder, near his home on York Street.’

According to those witnesses, Mr. McCombie said Mr. Phillion, a career criminal who never spent more than a few months out of jail, left Ottawa shortly after Mr. Roy was killed.

Mr. McCombie said he released Mr. Phillion after Mr. Roy’s widow, a witness to her husband’s murder, was unable to identify the killer in a lineup.

Still, Mr. McCombie said, ‘I had no doubt whatsoever that he was the one’ who committed the crime.”

It is hard to understand how the April 12, 1968 8:00 p.m. report can be read “out of context”. The report speaks for itself. In an editorial on November 9, 2001, the *Globe & Mail* put it succinctly:

“When a police officer heading a murder investigation decides it is impossible that a particular suspect was responsible, and states so in writing, you might believe the suspect is well in the clear.”

“Detectives have ‘absolutely no doubt’ Phillion is killer”, Ottawa Citizen, Record, Vol. 7, Tab 52
 “Romeo Phillion and the missing evidence”, Globe & Mail, Record, Vol. 7, Tab 55

370. The *Innocence Project* attempted to locate the Trenton Service Station in question in 1999 and 2000. Advertisements were run in a local Trenton newspaper *The Intelligencer* and on *CJTN*, a local radio station. The advertisement read:

“Were you in Trenton on August 9th, 1967?”

On Aug. 9/67 a broken red Ford convertible 1958 w/black top was towed to a service station in Trenton. This station was either on Sidney St. or Rd. #33, about 1 to 2 ml. South of Hwy 401. Between 12 & 1 p.m. the garage repaired this car by replacing the alternator. The driver then left his car radio as a collateral for the repairs. In spring 1968 a member of the Ottawa Police Dept. came to this service station and took away that car radio. If you know of these events please contact Osgoode Hall Law School, Toronto tel no. **416-736-5174 (Operator placed collect calls accepted)”**

There was no response to the appeals.

Advertisement, Record, Vol. 15, Tab 9

371. Students from the *Innocence Project* and *Integra Investigation Services* conducted investigations in Trenton without success. On February 25, 2002, *Integra* went to Trenton. They observed that the drive from the 401 Highway to Trenton took two to three minutes. They spoke to Sgt. Laurie Delong, one of the longest serving members of the Quinte West Police Force. They spoke to other long standing residents of Trenton. They also spoke to present-day local service station owners, conducted searches for business records in the Archives of Ontario, and obtained the *Yellow Pages* for the 1967 era, but to no avail.

Report of Integra Investigation Services, Record, Vol. 15, Tab 6

(c) The August 8, 1967 Traffic Ticket and the Stop at Young's Service Station

372. The ticketing of Romeo Phillion on Highway 17 at 6:00 p.m. on August 8, 1967 is important corroboration that Phillion was not in Ottawa on August 9; likewise the confirmation secured by the police that Phillion stopped at Young's Service Station that same day west of Arnprior and exchanged a suitcase as payment for gas.¹³³

373. Firstly, it demonstrated that the Barbes' original memories that they saw Phillion on Tuesday evening were accurate because they recalled Phillion telling them that he had received a ticket earlier that afternoon.

374. Secondly, Norton and Huneault testified respectively that on two separate occasions on January 11, 1972 Phillion told them that after committing the murder he had driven on Highway 17 and been stopped and ticketed in the vicinity of Arnprior, and continued on to Toronto via Trenton, and then to New Liskeard. If it is assumed that Phillion was near Trenton at the time Mr. Roy was murdered, then these further claims are a mixture of fact and fiction.

- In his claims, Phillion delayed his actual trip to Toronto "via Trenton" until after the murder. This, of course, he had to do to maintain the pretence that he had committed the murder, and

¹³³ Young's Service Station could not offer a date for when the event happened (*supra*, paragraph 282).

- he claimed that the ticket, his stop at the service station, and his drive via Trenton, all of which actually happened, occurred on the same day, after the murder, which they did not. The drive to Trenton occurred on the following day (or late at night on Tuesday). It may even be that by 1972, Phillion actually incorrectly recalled that he was ticketed on his way to Trenton. After all, he subsequently came to believe that he was ticketed on August 8 in *New Liskeard*.

375. In his January 5, 2002 memorandum (*infra*, paragraph 398), Phillion claims that he had left Ottawa in the afternoon/evening of August 8 to drive to New Liskeard when he was pulled over on Highway 17. This would have been a feasible route to take for such a journey. He further states that the police officer who gave him the ticket told him to return to Ottawa until he obtained insurance. This does not make sense because he kept driving a considerable distance west, from where he got the ticket, to Young's Service Station. More likely is that he realized he had insufficient money on him to buy enough gas to get all the way to New Liskeard, so he returned to Ottawa. He chose to leave again that night, after dark and, after talking to Mr. Barbe, took "another route towards Kingston". Driving via Kingston would be one of the logical routes to go from Ottawa to, first, Toronto. Phillion's recent account of his travels on August 8 and 9, 1967 do have some logic to them.

"Retracting Dates of My Travels", Record, Vol. 15, Tab 3

(d) Mrs. Roy's Identification Evidence is Now Known
to be Even More Unreliable than was Perceived in 1972

376. At Mr. Phillion's trial, the quality of Mrs. Roy's identification evidence was poor. She had a limited opportunity to observe the intruder, and her observations were made under very trying

circumstances. Her opportunity can be fairly characterized as a fleeting glimpse. The several line-ups that she viewed, whether in-person or by way of photographs, led to potential tainting problems.

This danger was particularly acute where her identification of Romeo Phillion was concerned:

- the photographs shown to her on August 10, 1967, in which she picked out the Phillion twins and said “These look very much like brothers” and then, according to Detective McCombie, chose Donald Phillion “as the person she thought most as resembling the person” was fraught with danger. By her own admission, Mrs. Roy was drawn to the photographs of the Phillion twins because they looked the same. As she said in her evidence, “there was something that looked fishy”. She did not, apparently, first pick them out because they looked like the intruder. It was only after noticing the likeness of the Phillion twins that she concluded they resembled the intruder.
- it is impossible to say whether her initial identification of Romeo Phillion at the in-person line-up on August 15 was an identification of him as the intruder, or an identification of him as one of the twin brothers she had seen in the two photographs on August 10.¹³⁴
- Mrs. Roy had seen media reports regarding Phillion’s arrest in 1972 for her husband’s murder. She told P.C. Huneault this on January 13. The reports included a picture of Phillion. This further tainted her in-dock identification of him at the preliminary hearing and trial.
- her in-dock identification was likely further tainted by her knowledge that Romeo’s identical twin brother, Donald, had himself been convicted of murder. Mrs. Roy had even gone to Court to watch one day of Donald’s preliminary hearing.¹³⁵

¹³⁴ The trial judge made this point in her charge to the jury.
See Charge to Jury, Vol. 6, 1288/30 to 1289/30

¹³⁵ For understandable reasons, Mr. Cogan did not raise this with the jury at Romeo’s trial.
See Submissions at trial, Vol. 3, 675/20-40

Other problems existed by the time of her dock identification of Mr. Phillion at the preliminary hearing and trial. For example, she thought that both Phillion twins were in the August 15 line-up. She was wrong. She repudiated her identification of Romeo on August 15 within a minute of making the identification. In the ensuing months, she identified three different individuals to the police as the intruder, none of whom were Romeo Phillion.

Evidence of Mrs. Roy, Vol. 2, 106/40 to 111/30, 134/40 to 136/20
Investigation report of Huneault, Jan. 13/72, Record, Vol. 2, Tab 98

377. Despite the kinds of cautionary instructions given by Van Camp J., juries still do not appreciate the dangers inherent in eyewitness testimony, and can place too much reliance on it. This point has recently been made by Commissioner Cory in his Report on *The Inquiry Regarding Thomas Sophonow (infra)*. The Commissioner's recommendation that expert evidence should be admissible in a case in which eyewitness identification evidence plays a significant role is particularly apt to Mrs. Roy's evidence. Commissioner Cory said:

“Further, I would recommend that judges consider favourably and readily admit properly qualified expert evidence pertaining to eyewitness identification. This is certainly not junk science. Careful studies have been made with regard to memory and its effect upon eyewitness identification. Jurors would benefit from the studies and learning of experts in the field. Meticulous studies of human memory and eyewitness identification have been conducted. The empirical evidence has been compiled. The tragic consequences of mistaken eyewitness identification in cases have been chronicled and jurors and Trial Judges should have the benefit of expert evidence on this important subject. The expert witness can explain the process of memory and its frailties and dispel myths, such as that which assesses the accuracy of identification by the certainty of a witness. The testimony of an expert in this field would be helpful to the triers of fact and assist in providing a fair trial.”

See *contra R. v. McIntosh* (1997), 117 C.C.C. (3d) 385 (Ont.C.A.)
The Inquiry Regarding Thomas Sophonow, (September/01), p. 3

378. Van Camp J. gave the jury a general warning on the dangers of relying on identification evidence. She gave no specific warning about the particular dangers to be associated with an in-dock identification which is, in fact, what Mrs. Roy's identification of Romeo Phillion was. Her in-dock identification was particularly unreliable because of her previous viewings of the Phillion twins on August 10, 1967 in photographs, and of Romeo at the in-person line-up on August 15, 1967. Van Camp J. reviewed Mrs. Roy's evidence and concluded by saying:

“However, and the Crown has said that it is not placing too much reliance on her identification, it is a factor to consider if you believe she made one.”

In *Hibbert*, the Crown's case included evidence of two eyewitnesses. The trial judge had instructed the jury:

“However, you must consider the possibility that Mrs. McLeod identified the accused in court from her memory of either the photograph in the line-up or the television newscast instead of from her memory of the person she saw at 151 Campbell Street on October 24, 1993. You must also consider the same possibility in respect of Mrs. Baker's in court identification of the accused.

I also remind you that both Mrs. McLeod and Mrs. Baker positively identified the accused for the first time when each was asked to identify him in the courtroom at the preliminary hearing and at the first trial and at this trial and the law provides that the identification of the accused for the first time in the courtroom after a failure to positively identify him from a photo line-up is to be accorded little weight.”

Arbour J. held that this warning was insufficient. She said:

“I am of the view that, in the circumstances of this case, the trial judge should have cautioned the jury more strongly that the identification of the accused in court, by Mrs. McLeod and Mrs. Baker, was highly problematic as direct reliable identification of the perpetrator of the offence. I think it is important to remember that the danger associated with eye-witness in-court identification is that it is deceptively credible, largely because it is honest and sincere. The dramatic impact of the identification taking place in court, before the jury, can aggravate the distorted value that the jury may place on it. I am not persuaded that the instruction quoted above, to the effect that such identification should be accorded “little weight”, goes far enough to displace the danger that the jury could still give it weight that it does not deserve.”

Arbour J. continued:

“The danger of wrongful conviction arising from faulty but apparently persuasive eyewitness identification has been well documented. Most recently the Honourable Peter deC. Cory, acting as Commissioner in the Inquiry regarding Thomas Sophonow, made recommendations regarding the conduct of live and photo line-ups, and called for stronger warnings to the jury than were issued in the present case.

While it unnecessary to consider these recommendations in detail, I share the concern expressed by the Commissioner and, in this particular case, I think it would have been prudent to emphasize for the benefit of the jury the very weak link between the confidence level of a witness and the accuracy of that witness. Moreover, here it should also have been stressed that the impact of Mrs. McLeod having seen the appellant arrested by the police as her alleged assailant could not be undone. Nor should she be expected to divorce her previous recollection of her assailant from the mental image that she formed after having seen the appellant on television.”

Consequently, a jury today would be instructed to subject Mrs. Roy’s evidence, if admitted, to greater scrutiny than Phillion’s jury was. Alternatively, a trial judge might rule that Mrs. Roy’s identification evidence so lacks probative value that it should not be admitted into evidence.

Charge to Jury, Vol. 6, 1285/10 to 1290/40
R. v. Hibbert (2002), 63 C.C.C. (3d) 129 (S.C.C.) at 146-8
R. v. Holmes (*supra*) at 358-359

379. The undisclosed police reports further undermine what little weight Mrs. Roy’s identification of Romeo Phillion as the intruder ever had. In *Johnson*, the Court of Appeal in England reviewed a 31 year old robbery conviction in which the prosecution’s case rested primarily on the evidence of one eyewitness. In quashing the conviction in 2001, Lord Woolf C.J. said:

“The approach of the courts to identification has become much stricter than it was in 1968.The test which this Court is required to apply is to approach the issues in the round. In doing so, it can only apply the standards which this Court adopts today. No one can be criticised for applying standards which were current at the time of any trial. If, however, as a consequence of doing that the trial is properly regarded by this Court as unsafe, this Court must intervene. That is the approach which we adopt to this appeal. We regard the appellant’s conviction as unsafe. Although his trial took place a long time ago, and although he served the sentence which was imposed upon him, we feel that we have no alternative but to quash his conviction.

It is obviously a matter of very real regret to this Court that it has taken so long for this result to be achieved. It is indeed unfortunate that by the standards which were then applicable, this Court took a different view when the appeal came before it on a previous occasion. However, judged by our standards today, the appellant has been the subject of injustice.”

R. v. Johnson [2001] 1 Cr.App.R 408 at 414-5

380. The Court of Appeal in England has frequently considered the question of whether the safety of a conviction should be viewed from the perspective of the rules that existed at the time of the conviction under attack, or from the perspective of present day standards. The Court has resoundingly favoured the latter approach. In *Bentley*, the Court of Appeal reviewed the 1952 conviction and execution of Derek Bentley after a referral by the Commission. In considering the standards to be applied by the Court in its review, the Chief Justice said:

“Rarely has the court been required to review the safety of a conviction recorded over 45 years earlier. In undertaking that task we conclude:

- (3) The conduct of the trial and the direction of the jury must be judged according to the standards which we would now apply in any other appeal
- (4) We must judge the safety of the conviction according to the standards which we now apply in any other appeal

Where, between conviction and appeal, there have been significant changes in the common law (as opposed to changes effected by statute) or in the standards of fairness, the approach indicated requires the court to apply legal rules and procedural criteria which were not and could not reasonably have been applied at the time. This could cause difficulty in some cases but not, we conclude, in this. Where, however, this court exercises its power to receive new evidence, it inevitably reviews a case different from that presented to the judge and the jury at the trial.”

In *Fell*, Waller L.J. held that old cases of wrongful conviction should be looked at through “present day eyes”.

R. v. Bentley, [2001] Cr.App.R. 307 at 310
R v. Fell, [2000] E.W.J. 1324 at 13

381. One further point should be made in this context. In her charge to the jury, Van Camp J. said:

“Let us look, first of all, at the identification of Mrs. Roy and again, even if you accept her identification, you will remember that all she does is identify the accused as having been on the second floor and, if you accept her statement – her evidence, as having been in a struggle on the landing, so that we start, first of all, with her identification of the person she saw.”

This instruction was both strange and prejudicial to the defence. The intruder was undoubtedly Mr. Roy’s assailant. By suggesting otherwise, Van Camp J. put forward an alternative defence never advanced by Mr. Cogan.

Charge to Jury, Vol. 6, 1285/10 to 1290/40

PART 6**WHY WOULD MR. PHILLION NOT HAVE TOLD HIS COUNSEL THAT HE WAS NEAR TRENTON AT THE TIME OF THE HOMICIDE?*****INTRODUCTION***

382. It is necessary to consider why Arthur Cogan did not advance a defence, based on instructions from his client, that Mr. Phillion had left Ottawa before the murder and had broken down near Trenton on the Wednesday afternoon.

383. A review of what Romeo Phillion told people in 1967, 1972, and thereafter, of his whereabouts at the time of the murder is instructive in this regard.

- August 13, 1967: according to McCombie's August 13, 1967 report, Phillion told him and Coburn at 8:00 a.m., after his arrest in New Liskeard, that he was in *New Liskeard* "at the time of the commission of the offence".
Investigation Report of McCombie, Aug, 13/67, Record, Vol. 2, Tab 26
- August 13-15, 1967: it has been submitted that sometime in this three day period, Phillion told McCombie (and Coburn) that he left Ottawa on the Tuesday night/Wednesday morning, was driving along Highway 401 towards Toronto, and broke down near *Trenton*.
- August 13, 1967: P.C. Brown told P.C. Nadori on January 17, 1972 that he recalled Phillion telling him on August 13, 1967 that he had been stopped by the OPP on Wednesday, August 9, 1967 near *Arnprior*, and on the evening of August 9 had run out of

gas on the highway near *Kingston*, and had been taken by a police officer to a gas station.

Investigation Report of Brown, Aug. 13/67, Record, Vol. 2, Tab 102

Results of New Liskeard Police Department investigation prepared in Jan./72 for Nadori, Record, Vol. 2, Tab 102

See also Investigation Report of Nadori, Jan. 17/72, Vol. 2, Tab 103

- March 25, 1971: Phillion told McCombie that his brother Donald would confess to the murder.
- January 11, 1972 throughout the afternoon: by his confession, Phillion told the police how he was in *Ottawa* at the time of the murder. He told Huneault and Nadori that after the murder:

“Around eleven-thirty that night I drove to Trenton, Ontario, the next day I went to *Toronto* and then to *New Liskeard*, Ontario.”

Investigation Report of Huneault, Jan. 11/72, Record, Vol. 2, Tab 92

- January 11, 1972 at around 5:00 p.m.: at the end of the first trip to Friel Street, Phillion told Norton that, after the murder, he left *Ottawa* via Highway 17, was stopped by the police and ticketed, and then drove “to *Toronto via Trenton*”¹³⁶ and on to *New Liskeard*.

Investigation Report of Huneault, Jan. 11/72, Record, Vol. 2, Tab 97

- January 12, 1972 at 7:30 a.m.: in response to Norton’s question as to whether he remembered selling the car radio, Phillion responded that he thought he was in *Trenton* “about the time the offence was committed”.

- January 12, 1972 at 7:50 a.m.: only twenty minutes after telling Norton that he thought he was in *Trenton* at the time of the murder, Phillion told Aldrich that he had “three lawyers that can say I was in *Montreal* at the time of the murder”. Later, he told Aldrich he had been 300 miles away at the time of the homicide.

Witness Statement of Aldrich, Crown Brief, Record, Vol. 13, Tab 47

¹³⁶ It is noteworthy that Phillion would have had no reason to say he went to *Toronto* via *Trenton* unless something happened in or near *Trenton en route*.

- January 13, 1972: Mrs. Phillion told Huneault and Nadori that her son wanted them to know he was in *Toronto* with his girlfriend at the time of the murder.

Investigation Report of Nadori, Jan. 13/72, Record, Vol. 2, Tab 99

- March 10, 1972: Phillion told Norton and Coburn that he had told McCombie where he was when arrested by him in New Liskeard on August 13, 1967. He was not then asked where this was.

Statement of Romeo Phillion, Mar. 10/72, Record, Vol. 14, Tab 4

- 1991 – 1999 : Phillion repeatedly told the Department of Justice, and anyone who would listen to him, that he was in *New Liskeard* at the time of the homicide.

Record, Vol. 8, *passim*

384. A handwritten document prepared by Mr. Lindsay, likely in anticipation of the trial, is relevant in this context in that it constituted Mr. Lindsay’s view of the various accounts of Phillion’s whereabouts that he had disclosed to the defence. He wrote as follows:

“ALIBI

Accused’s explanations of his whereabouts August 9/67 2:45 p.m.

- Jan 13/72 Told his mother at the time of the murder he was with girlfriend in Toronto.
- Sept 13/67 Marilyn Cote finds receipt in purse – one signed by Romeo dated Aug 10/67 re Falcon car.
- Jan 12/72 Told Cst Aldrich “I have 3 lawyers that can say I was in Montreal at time of murder.”

I was 300 miles away. I have 3 lawyers to prove it!
- Aug 14/67 McCombie interview – denied offence. Said he was in New Lisk at time.
- Mar 25/71 Romeo told McCombie that Donald murdered Roy.

- Evening Aug 9/67 ran out of gas near Kingston. Police drove him to gas station. Said this to Brown.
- Phillion told Brown he had been stopped by police as he left Shell Stn. near Arnprior on Aug 9/67.”

Crown’s Handwritten Notes, Record, Vol. 12, Tab 1

385. Not surprisingly, it is unclear where Phillion told Mr. Cogan he was at the time of the homicide and whether he was at all consistent in this regard. On April 11, 1995, Mr. Cogan told Jack Parish, who had raised with him the possibility that Romeo had been in New Liskeard at the time of the murder, that “Mr. Phillion gave him no names of witnesses concerning the alibi evidence which [Parish] had mentioned or any other.” During the preliminary hearing, Mr. Cogan seemed to anticipate calling alibi evidence. For example, during defence submissions on Norton’s evidence, Mr. Cogan said:

“... we are dealing *with a matter of alibi* and I submit it should be led by defence counsel or, alternatively, if my friend undertakes that if it is reached at trial my friend will not say that it was not raised at the first reasonable opportunity.

.....

Dealing with the Soloway and Mills case, 53 CCC, a decision of the Alberta Court of Appeal, at page 181, Harvey, C.J. said that a preliminary hearing is not a trial the outcome not being necessarily final, but it may be a final disposition if no case is made out, and that the defence ought to be given a fair chance *to make out an alibi*.

The other thing is in the case of *Churchman and Durham*, 110 CCC wherein Mr. Justice Lebel of the Ontario Court of Appeal said at page 385 that a preliminary inquiry an accused person is always entitled to cross-examine for the purpose of demolishing the Crown’s case and that at a trial where evidence of identification is one of the issues, he is entitled to the widest latitude in delving into the circumstances of alleged identification.

I submit that this is important evidence in demolishing the Crown’s case *and to show that my client was elsewhere at the time the crime was committed.*” (emphasis added)

In a pre-trial memorandum that he prepared, Mr. Lindsay wrote that he expected a defence of alibi to be advanced at trial. However, a number of comments that Mr. Cogan made during the

preliminary hearing, and his cross-examinations of McCombie, Huneault and Norton at the preliminary hearing, make it clear that his client had not told him that his car broke down on the highway near Trenton around the time of the murder. Indeed, as has been noted, by the time of trial Mr. Cogan was prepared to concede that Mr. Phillion was in Ottawa at the time of the murder.

See Preliminary Hearing, Vol. 7, 22 to 26
Lindsay's reporting letter for Fraser J., Record, Vol. 14, Tab 28
Parish interviews Cogan, Apr. 11/95, Record, Vol. 15, Tab 12

(a) Mr. Phillion's Memory According to the Experts

386. Phillion's failure over the years to consistently maintain any version of where he had been at the time of Mr. Roy's murder accords with his psychological profile. It also fits his lifestyle. He spent the summer of 1967 drifting around Ontario, and used hallucinogenic and other types of drugs extensively.¹³⁷

387. In September 2002, Dr. Graham Turrall, a clinical psychologist, prepared a forensic neuropsychological assessment of Mr. Phillion, which addressed his intellectual and cognitive abilities. Psychological tests performed for the purposes of the evaluation recorded Phillion's higher cognitive functioning to be in the Low Average to Mildly Impaired Range. Phillion's results on tests measuring Working Memory placed him in the Low Average Range. Overall, Phillion's performance on tests involving working memory indicate that he forgets information more quickly

¹³⁷ In his May 31, 1972 report to Justice Hutton, Dr. Wayne noted that "There had been considerable abuse with non-medicinal drugs for about 5 years with the use of hallucinogenic drugs such as LSD and MDA to the intravenous use of amphetamines (speed)." Report of Dr. Wayne to Justice Hutton, May 31/72, Record, Vol. 6 Tab 49

than would his age related peers. Dr. Turrall noted that:

“Historically, Mr. Phillion has been an unreliable historian. In part, his unreliability not only includes simple forgetfulness but is consistent with his psychological make-up which at the time of his confession had been exacerbated for several years by his significant abuse of alcohol and drugs and chaotic lifestyle. This would have been particularly true between 1967 until his arrest in 1972.”

Report of Dr. Turrall, Record, Vol 16, Tab B,1

388. Dr. Gisli Gudjonsson, Professor of Forensic Psychology at the Institute of Psychiatry, London, and Head of Forensic Psychology Services at the Maudsley Hospital, is one of the world’s leading experts on false confessions. Dr. Gudjonsson conducted a detailed psychological evaluation of Phillion and his confessions based on interviews with Phillion and psychological testing.

389. Dr. Gudjonsson had Romeo Phillion carry out several tests to determine his ability as a historian. The results were revealing.

- Phillion is highly likely to confabulate whenever he tries to describe an event that he has witnessed (more so than 90 to 95 percent of the population).
- Phillion is highly likely to adopt the contents of a leading question (more so than 98 percent of the population).
- Phillion is highly suggestible when pressured (more so than 98 to 99 percent of the population).
- In recalling an event, Phillion will do his best to say what the listener wants to hear and avoid conflict with others (more so than 98 percent of the population, “indicating an abnormally high degree of compliance on his part.”).

- Phillion is extraordinarily prone to answer questions in the affirmative, regardless of the content of the question (more so than 99 percent of the population).

Report of Dr. Gudjonsson, Record, Vol 16, Tab A,1, pp. 14-15

390. Dr. Gudjonsson concurred with Dr. Turrall's assessment of Mr. Phillion. He did not believe that Phillion was trying to mislead him during their interview but considered him to be an unreliable historian. He noted that he seemed to be trying hard to give a complete, accurate and honest account of events. Dr. Gudjonsson provided the following explanation for Mr. Phillion's inability to recall where he was on the day of the murder:

“There are serious problems with relying on what Mr. Phillion now says about where he was at the time of the murder.... Part of the problem is the length of time since his arrest and detention in 1972, probably combined with specific memory problems as highlighted by Dr. Turrall's assessment of Mr. Phillion's cognitive functions, impulsivity, proneness to confabulation, and a process of rationalisation and self-justification. However, not all of his accounts relating to the murder of Leopold Roy were self-serving (i.e. favourable to his defence). Probably the best example is Mr. Phillion's lack of memory of his Trenton alibi when seen by his lawyer in 1972. It is probably a reflection of him becoming easily confused when interviewed about his case (I noticed this tendency during my interview with him).”

Report of Dr. Gudjonsson, Vol. 16, Tab A,1, pp. 14-15, 33

391. A good example of an unsuccessful attempt by Mr. Phillion to be truthful was his continual assertion to his appellate counsel, Mr. Crane, that he had been ticketed in New Liskeard on August 8, 1967 and not August 11, 1967 as the record reveals. As Jack Parish, the private investigator, stated in a letter dated August 20, 1992 to Mr. Crane:

“The Investigator is puzzled as to why Romeo would insist on the August 8th date. Surely he would realize that records would be able to confirm the true date upon which the traffic ticket was issued.”

The answer, of course, is that Phillion was confusing his August 8 Highway 17 ticket with his August 11 New Liskeard ticket (see paragraph 288 *supra*).

Letter of Jack Parish to J. Douglas Crane, Q.C., August 20, 1992, Record, Vol 3, Tab F,1

392. Both Dr. Turrall's and Dr. Gudjonsson's observations of Phillion's memory and cognition suggest that Phillion has a poor memory and is an unreliable historian, which account for his inability in 1972 and thereafter to recall where he had been on August 9, 1967. Phillion confabulates details he cannot remember, is easily misled, becomes suggestible when pressured, is motivated to please others and avoid conflict, and is unusually prone to answer questions affirmatively, regardless of content. This helps explain why Phillion has offered numerous accounts over the years for where he was when Mr. Roy was murdered.

(b) Conclusions to be Drawn

393. What conclusions can be drawn? How did Romeo Phillion instruct his counsel? Were his instructions consistent throughout? No definitive conclusions can be drawn but several observations can be made.

- There can be no doubt that Mr. Phillion is an unreliable historian. As Dr. Gudjonsson has noted, Mr. Phillion's sincere attempts to be truthful in their meeting highlights his memory problems and the ease with which he becomes confused. Furthermore, his accounts of events have changed many times. He confabulates seemingly "at will." He has a tendency to rationalize and self-justify. For example, his claim today to Professor Gudjonsson that he confessed in order to protect Neil Miller is likely a product of confusion, poor memory,

his desire to present himself in as good a light as possible, and to avoid “blame” for his situation for the past 31 years *viz.* that he fears he may be seen to be the author of his own misfortunes by confessing to a crime that he did not commit.

- Mr. Cogan was privy to several of his client’s claims as a result of Crown disclosure. He knew that he claimed to have been in Ottawa (in his confessions), Trenton (Detective Sgt. Norton), Montreal (P.C. Aldrich), and Toronto (Mrs. Phillion), at the time of the homicide. It may be that Phillion told Mr. Cogan of one or more of these claims. It may be that he told Mr. Cogan, as he maintained to the Department of Justice for years after his conviction, that he was in New Liskeard.
- Mr. Cogan was faced with four witnesses who claimed to have seen Mr. Phillion in Ottawa on Wednesday evening. Two of them, Mr. and Mrs. Barbe, seemingly had no credibility problems. He did not know that their testimony was contrary to what they had said to McCombie in 1967. He did not know that the traffic ticket, which both the Barbés remembered Phillion telling them of, had been given to Phillion on Tuesday, not Wednesday.
- In 1972, Mr. Phillion was trying to recall days and events that had occurred in mid-August, 1967. He likely had been called upon to remember the days surrounding Mr. Roy’s murder after his arrest in New Liskeard and told McCombie and Coburn the details of his journey from Ottawa to New Liskeard. He probably got his times and days confused. He would not, of course, have known that McCombie subsequently established that he had an alibi for the time of the murder. Bearing in mind his unreliability as a historian, it seems entirely feasible that by 1972 Phillion had a mixture of memories as to where he was on the Tuesday, Wednesday and Thursday. This is consistent with Detective Sgt. Norton’s recollection of Phillion’s response when he asked him whether he remembered selling the car radio in Trenton. Phillion’s verbal response

“When did you find that out? I sent my lawyer to check that out. My car broke down, I owed \$11.00 and I gave them the radio. Through the information from my lawyer *I think* I was in Trenton about the time the offence here was committed.” (emphasis added)

appeared to include a sense of surprise on his part, followed by the expression “I think” which suggests he was far from certain that he had been in Trenton that day. It may have been sometime later that he returned to the belief, that he had apparently expressed to McCombie in 1967, that he was in New Liskeard by Wednesday.

Report of Dr. Turrall, Record, Vol. 16, Tab B,1
Investigation Report of Norton, Jan. 12/72, Vol. 2, Tab 97

394. Arthur Cogan, it can be presumed, would have asked his client about the possibility that he was in Trenton on Wednesday. Phillion may, or may not, have embraced the memory. Mr. Cogan also had his client’s signed confession in which he said he drove to Trenton leaving Ottawa at 11:30 on Wednesday night. It is doubtful that Phillion would have embraced the Trenton memory with any consistency because he has never been a consistent thinker. In these circumstances, Mr. Cogan would, at best, have been left with a possible whereabouts for his client with no feasible means of verifying it five years later. He made an attempt to see if the Trenton alibi was verifiable during his questioning of Huneault at the preliminary hearing, but without success.

395. We have corresponded with Mr. Cogan in an attempt to find out what he knew. On October 16, 2000, we wrote and advised him of the April 12, 1968 report and set out relevant sections of the preliminary hearing and trial transcripts, including Norton’s account of his January 12 conversation with Phillion at both proceedings and Mr. Cogan’s questioning of Huneault at the preliminary hearing about the Trenton alibi. Copies of transcript extracts were enclosed. Our letter concluded as follows:

“I appreciate that reconstructing your memory after 28 years is an almost impossible task. It may be that, at the time of the trial, you had some idea about the Trenton alibi but no reason to give it any credence. The non-disclosed 1967 McCombie report would have provided credence to the alibi. In its absence, you had little to go on.

We need your assistance for the s. 690 application. Would you be good enough to give me your memory and ideas in writing. If you feel it would be helpful to meet again, I would be pleased to come to Ottawa at your convenience.”

On December 1, 2000, Mr. Cogan replied:

“I have your letter of October 16, 2000. I agree with the contents of same and wish to make the following comments:

.....

2. It is obvious that at some point the Police received information from Mr. Phillion that he was in the Trenton area. I brought this to the attention of the Court (see page 3 of your letter). However, I was not aware of the police establishing evidence confirming Mr. Phillion’s alibi. I therefore agree with the conclusion set forth in your letter. To this day, I have been provided with no reason why the Police and Crown did not disclose this information. I would be interested in knowing if the Crown knew about Phillion’s alibi as this information was kept from me.”

Letter from J. Lockyer to A. Cogan, Oct. 16/2000, Record, Vol. 3, Tab E,13

Letter from A. Cogan to J. Lockyer, Dec. 1/2000, Record, Vol. 3, Tab E,14

396. In conclusion, it is understandable that Mr. Cogan was satisfied that a challenge of the Barbes (and Brazeaus), without any basis for that challenge, was more likely to undermine his defence than help it. His thoughts of an alibi at the preliminary hearing had floundered in the absence of any foundation for it other than Phillion’s own confusing memories. The contemporary law of disclosure did not encourage applications for broader disclosure. Phillion himself would make an unlikely witness in his own defence. Mr. Cogan’s concession that Phillion was in Ottawa was probably no more than conceding the inevitable since he had no ability to prove otherwise.

397. It is important to note that Mr. Cogan’s conduct of the defence was consistent with Romeo Phillion having maintained his innocence throughout the proceedings and Mr. Cogan believing him.

By retaining Dr. Arboleda and Dr. Girodo to establish that Phillion's confession was false effectively proves the former proposition, and strongly suggests the latter. His retainer of John Reid, the polygrapher, buttresses these conclusions; more so because circumstances dictated that he had to advise Van Camp J. of his intention to retain a polygrapher *in advance* of the proposed examination. It should be added that, in private conversation, Mr. Cogan has assured us that Phillion always asserted his innocence to him, and that he believed him.

See Transcript, Vol. 5, 1057/40 to 1064/40

(c) A Footnote – Mr. Phillion's Memorandum of January 5, 2002

398. As a footnote, Mr. Phillion has prepared a document dated January 5, 2002 entitled "*Retracting [sic] Dates of My Travels During the Period July and August 1967.*" It is drafted in language which suggests that he had considerable help in preparing it (perhaps from a fellow inmate). It is an attempt by Mr. Phillion to retrace his movements in July and August 1967, no doubt with the assistance of the police investigation reports that he had had a chance to read by this time. It reads, in full, as follows:

RETRACTING DATES OF MY TRAVELS DURING THE PERIOD JULY AND
AUGUST 1967

Gail and I left Ottawa to go to Toronto around the 10th of 12th of June. We rented an apartment on College St. We saved up enough money to by a car. It was 1959 Ford Fairlane convertible red with white top. We then left Toronto to go live and work in Wasaga Beach. Gail got a job as a waitress. I got one at a carnival working for Don Fielding Enterprise. We stayed there for a couple of weeks and then went to New Liskeard in Ontario.

We visited all my uncles and we proceeded to uncle Albert's farm. He needed help to harvest his crop and I gave him a hand. We stayed there for 3-4 days to finish the harvest and we went to Kirkland Lake and Noranda, Quebec. We stayed there for 2 days and went back to my uncle's farm to say goodbye. This was on August 3rd 1967. On that day we left and proceeded to Ottawa.

On our way, in North Bay we were stopped by OPP and I received a ticket for driving without the insurance.

We arrived in Ottawa around 17:30 on the 3rd of August. We ran out of money and we didn't have enough gas to make it to Gail's mother. So, we stopped at the gas station on the outskirts of Ottawa. We left our suitcase as a collateral for the \$5.00 worth of gas. Then we proceeded to Gail's mother's house on York St. We arrived there at 18:00. We were told that Gail's sister died of a tumor at a hospital. We were told by Gail's mother that she wanted to see us both before her death. We didn't get the message until it was too late.

We stayed at Gail's mother house for 5 days. On the 8th of August, 1967 I left Gail there telling her that I was going back to New Liskeard. I would call her to come down when I will have found a job. I left her house around 15:00 on August 8th.

When I got to the outskirts of Ottawa, I was stopped by the police and given a ticket. I was told to return to the city until my car was fixed and I'd get insurance. I returned to Gail and told her what happened. It was about 15:30. I showed her the ticket and told her that I would wait until dark before I leave Ottawa. I left again around 21:30 - 22:00 the same day.

I took another route towards Kingston. I stopped at a service station to fix a flat tire. Then I took 401. My car broke down in the area of Trenton. A generator light came on and engine stalled. I remained in the car all night.

In the morning at about 10:00 on 9th of August I got help from a priest. He drove me to the service station in Trenton. There I told an attendant that my car broke down on the 401 with generator problems. He told me to get in his wrecker and we went to pick up my car. We got there, hooked the car and returned to the garage.

In the garage the generator was serviced and it took about 35-45 minutes. It was around 12:30. I left my car radio for the bill and gas. At 13:00 I left Trenton.

I proceeded to Clarkson, ONT where my brother resides. I got there at about 15:15 only to be told that he left a couple of days ago for my uncle's cottage in North Bay.

I arrived to North Bay on the 9th of August 1967 about 17:30. My brother was on the lake fishing at that time. My sister-in-law Diana told me that he shouldn't be too long. When he arrived with the boat we went fishing together for a couple of hours. Around 20:00 - 21:00 I left the cottage and proceeded to New Liskeard.

That night a big storm started. I couldn't drive because of heavy rain and I parked on the side of the road between North Bay and Temagami. When rain lifted off I proceeded farther. I arrived to New Liskeard at about 06:00 on 10th of August. Around 06:15 police officer came to the car and asked me what I was doing there. I told him that I waited for my mother to wake up.

Later that morning I got into the house and found my sister, my twin-brother and my younger brother there. I spent some time there and around 10:00 I went to my uncle's farm. I told him that I would be back next day to help him and returned to town. My twin brother and I took a picture.

On August 11th 1967 I was stopped by the police in New Liskeard and was given a ticket for not having a the insurance again and was told to park the car and fix it before I could drive again. I phoned to my uncle to tell him that I couldn't make it to his farm. I explained to him why and he offered to come and pick me up, [but] I had to work on my car and he understood that.

On August 12th, late at night the police officers came to pick me up. I was taken to the station and locked up. I was told that Ottawa police were on their way to question me, but not given a reason why.

On August 13th 1967 detective McCombie showed up and asked me if I knew a guy by the name Leopold Roy. I said that I didn't. He then asked me where I was on the 9th of August. I said that I was in New Liskeard, which didn't correspond with my later affidavit. One has to keep in mind that my whole life of that time was on the road. A drifter doesn't have clear concept of fixed dates and places. This would reasonably explain the discrepancies. Later that day, Detective McCombie went to my car and took the garage receipt and traffic tickets stubs from glove compartment.

January 5th 2002.

Romeo Phillion

“Retracting Dates of My Travels”, Record, Vol. 15, Tab 3

399. This account was constructed, no doubt, with the aid of what is now known from the police reports. There are several interesting features to it (some of which confirm Mr. Phillion's unreliability as a historian):

- He says in the memorandum that he and Gail left a suitcase as collateral for \$5.00 worth of gas when they were travelling from North Bay to New Liskeard. This brings to mind his memory, recorded by the police on January 12, 1972 after the first visit to 275 Friel Street, that after the murder he left town on Highway 17 and “somewhere east of Arnprior went to

a Shell Service Station and pawned a suitcase for some gas as he was out of funds.” Of course, his stop at Young’s Gas Station (which was west of Arnprior) would actually have occurred on August 8.

- He states that he was ticketed on August 8, 1967 as he was leaving Ottawa. This is now known to have happened and corresponds with what he told the Barbes in 1967.
- He remembered that, after being ticketed, he returned to Ottawa at about 3:30 p.m. on August 8 and spoke to Gail Brazeau.
- He says that when he left Gail Brazeau that afternoon, he told her he was going to leave after dark for New Liskeard and would “call her to come down” when he got a job. This accords with what he wrote in his August 11, 1967 letter to Gail.
- He states he left Ottawa for a second time on the evening of August 8, 1967 at around 9:30 or 10:00 p.m. This can be reconciled with the statements that Paul and Denise Barbe, Gail Brazeau and Mrs. Brazeau gave Detective McCombie in August 1967, that they last saw Phillion on Tuesday evening at around this time.
- He states he “took another route towards Kingston.” A person driving from Ottawa to Toronto could reasonably drive past Kingston on Highway 401. P.C. Brown told Huneault and Nadori on January 17, 1972 that he remembered Phillion had told him he had run out of gas on a highway “near Kingston, Ontario.”
- He writes in his memorandum that in August 1967 he received help from a priest after his car broke down near Trenton. The priest drove him to a service station in Trenton. In handwritten notes that P.C. Brown prepared in 1972, he wrote that Phillion told him he ran out of gas *on August 3, 1967 in North Bay* and a priest assisted him.

- He writes that after leaving Trenton at 1:00 p.m. (which corresponds to the time recorded in McCombie's April 12, 1968 report wherein he wrote that the service station operator in Trenton advised that Phillion was in the service station between noon and 1:00 p.m.) he went to his brother's house in Clarkson. This accords with the letter he wrote to Gail on August 11, 1967 in which he stated that after leaving Ottawa, "I went to Toronto, to Armand [his brother] and I continued here, in New Liskeard".
- He states that he arrived in New Liskeard at about 6:00 a.m. on August 10, 1967, and was seen by a police officer about 15 minutes later. This would explain why, in his investigative summary of January, 1972, P.C. Brown stated the New Liskeard Police Department believed that Phillion had arrived in Ottawa in the early morning hours of August 10, 1967.
- He acknowledges in his memorandum that his claims in the past have been inconsistent:

"One has to keep in mind that my whole life of (sic) that time was on the road. A drifter doesn't have a clear concept of fixed dates and places. This would reasonably explain the discrepancies."

"Retracting Dates of My Travels", Record, Vol. 15, Tab 3

400. This analysis of Mr. Phillion's 2002 memorandum highlights confusion on the part of Mr. Phillion in 1967, 1968, 1972 and 2002 as he mixed and matched events that all occurred over a few days, and, at times, probably also highlights confusion on the part of police officers as they tried to record Phillion's memories and/or as they attempted to remember conversations with Phillion years after they took place.

(d) An Addendum – Frances Phillion’s Claim that
Romeo Made an Incriminating Statement to Her

401. On July 17, 1992, Jack Parish, interviewed Romeo’s mother, Yvonne Phillion. She told him that her former son-in-law, Jean-Paul Langlois, who was by now divorced from her daughter Frances, had told her sometime after Romeo’s conviction that he had committed Mr. Roy’s murder, not Romeo. Mrs. Phillion further claimed that her daughter, Frances, and Gail Brazeau were with Mr. Langlois at the time, and that Frances had told her that she had hidden the knife in Mrs. Roy’s kitchen. Mr. Parish then interviewed Frances on July 27, 1992 and asked her about these allegations. The interview included the following exchange:

“Q. Frances, do you believe that Romeo is guilty of killing Mr. Leopold Roy in August, 1967?

A. I really do not know. I really do not know. *Romeo told me he had thrown the knife in a garbage can.*

Q. He told you that?

A. He told me that.

Q. Did he ever say who was with him?

A. No.

Q. Do you know who killed Mr. Roy?

A. No. (emphasis added)

On August 19, 1993, Mr. Parish asked Romeo whether he thought Langlois had committed the murder. He considered it unlikely:

“When my mother told me about Jean-Paul’s confession, I felt it was just boasting on his part.”

Romeo denied telling his sister Frances that he “had thrown the knife into a garbage pail”. On April 12, 1995, Mr. Lefrancois of the Department of Justice interviewed Mr. Langlois who denied Mrs. Phillion’s claim. The above is an outline of a series of claims made by members of the Phillion family to Mr. Parish (who also interviewed Jean-Paul Langlois). No weight is placed on any of these claims in this Memorandum.

Statement of Frances Phillion, July 27//92, Record, Vol. 15, Tab 10
Interview of Jean-Paul Langlois, Apr. 12/95, Record, Vol. 15, Tab 16
Interview of Romeo Phillion, Aug, 19/93, Record, Vol. 15, Tab 11

PART 7**AN EXAMINATION OF THE RELIABILITY OF
MR. PHILLION'S CONFESSIONS TO THE
POLICE AND NEIL MILLER*****INTRODUCTION***

402. Since 1972, there have been substantial developments in the understanding of why someone might confess to a crime he did not commit. There is now considerable academic literature on the subject. A large number of wrongful convictions have recently been exposed in England and the United States which resulted from false confessions, and led to life sentences for murder and, in at least one, to execution.¹³⁸ In 1972, Mr. Cogan did not have the benefit of this body of learning and experience, yet he put up a remarkable psychiatric defence which, it might be said, was a defence before its time.

403. If Mr. Phillion was in Trenton between noon and 1:00 p.m. on August 9, his confessions to the police and Neil Miller were false. It is now proposed to review the confessions themselves, apart from the evidence that he was elsewhere at the time of the murder, to see whether they can be considered intrinsically unreliable. In the introduction to his report, Dr. Gudjonsson took a similar approach:

¹³⁸ *R. v. Mattan* (1998) E.W.J. No. 4668 (Q.L.) referred to in *United States v. Burns and Rafay* (2001), 151 C.C.C. (3d) 97 (S.C.C.)

“There are two main ways of determining the reliability of confession evidence (Gudjonsson, 2003). Firstly, the expert can rely on forensic, alibi, or eyewitness evidence to corroborate or dispute the confession. I understand from the documents in the case that there is solid alibi evidence from 1967 to support the view that Mr. Phillion is innocent of the murder of Mr. Roy and there is no forensic evidence to link him to the murder. I am not relying on these factors in my evaluation of the case.

Secondly, the expert can provide a psychological analysis of the confession and the person who made the confession. This is the focus of the present assessment. What I have attempted is to provide a model of understanding the confession, the retraction, and Mr. Phillion’s persistent denial of the murder since he made the confession in 1972. In conducting this analysis, I make no assumptions about Mr. Phillion’s guilt or innocence.”

The examination of the confessions themselves will be conducted from two perspectives:

- (a) a common sense analysis, many of the components of which are provided in the writings of experts on false confessions,
- (b) The analysis of experts who have assessed Mr. Phillion in person in order to determine whether he is the type of person to confess to a crime he did not commit.

(a) A Common Sense Analysis of Mr. Phillion’s Confessions

404. In *Oickle*, Iacobucci J. recognized that

“... a large body of literature has developed documenting hundreds of cases where confessions have been proven false by DNA evidence, subsequent confessions by the perpetrator, and other such independent sources of evidence.”

He referred to several academic writers in the field, including Richard Leo, a Professor of Criminology in the United States, Richard Ofshe, a Professor of Sociology in the United States, and Gisli Gudjonsson, a Professor of Forensic Pathology in the United Kingdom. The literature reviews a gamut of wrongful conviction cases in which the conviction was predicated primarily, or

exclusively, on a false confession, and suggests some methodological approaches to separating false from genuine confessions. Leo and Ofshe write of conducting a “post-admission narrative analysis”:

“There are at least three indicia of reliability that can be evaluated to reach a conclusion about the trustworthiness of a confession. Does the statement: (1) lead to the discovery of evidence unknown to the police?; (2) include identification of highly unusual elements of the crime that have not been made public?; or (3) include an accurate description of the mundane details of the crime scene which are not easily guessed and have not been reported publicly?”

It is with these ideas in mind that the reliability of Phillion’s confessions are examined.

R. v. Oickle (supra) at 341

The confessions themselves

405. Phillion confessed to Mr. Roy’s murder to persons in authority between noon and 7:30 a.m. on January 13, 1972:

- at noon, he verbally volunteered that he murdered “the fireman” to Huneault,
- from 3:10 to 3:45 p.m., his confession was recorded in typewritten form by Huneault and Nadori. Phillion then signed the confession,
- at 3:45 p.m., in a short conversation with Nadori, Phillion continued to maintain that he had murdered Mr. Roy,
- from 4:08 to 4:50 p.m., on the first visit to 275 Friel Street, he continued to talk and act as if he had committed the crime,
- from 7:35 to 8:20 p.m., on the second visit to 275 Friel Street, he acted and spoke as if he had committed the crime.

- (after telling P.C. Couture that he had falsely confessed to the murder) at 7:30 a.m. on January 13, he was asked by Norton to describe the knife which he claimed to have stolen. He was unable to do so but implicitly acknowledged that he had committed the murder. Having done that, he then suggested that he was near Trenton at the time of the murder.
- for the remainder of the morning, he told his custodians at the Ottawa Police Station that he had falsely confessed to the crime.

In addition, Phillion told his lover Neil Miller on two or three occasions that he murdered Mr. Roy. However, in the same time frame, he also told Miller that he did not commit the murder. Thereafter, for more than 31 years, Phillion has consistently asserted to everyone who would listen that he did not murder Mr. Roy, and that his confessions were false.

406. The police who spoke to Phillion claimed that they were not alerted to whether his confessions were true or false. Detective Nadori was asked:

Q. Did it ever come across your mind when you were questioning Mr. Phillion that a man might be confessing to something he did not do? Did that cross your mind?

A. I beg your pardon?

Q. Did that cross your mind, that this man might be making a statement of something he did not do, on the basis of what was told to you about him by a person who was close to him?

A. It is not my duty to think about those things.

Q. Well, you didn't; is that all you are saying?

A. I didn't.

407. Nadori and the other officers should have known better. In fact, they tried to verify Phillion's confession where possible, likely manipulating witnesses like the Barbes and the Brazeaus, and presumably discounted information that ran contrary to his story, such as the August 8 ticket. Huneault's "to do" list that he wrote out on January 13, 1972 makes for interesting reading. By and large, the results obtained did not corroborate Phillion's confession. For example, on January 12, 1972, the police tried to contact Mrs. Arkison. Huneault wrote in his report:

"Attempts were made January the 12, 1972, to contact Mrs. Arkison, of 275 Friel St., Apt. 14, to ascertain if in fact her premises had been entered on the date in question in 1967, and if any articles had been removed from her premises, to her knowledge." (emphasis added)

He then wrote as the first item on his "to do" list:

"Number 1, interview the occupant of Apt. 14, at 275 Friel St., as Phillion is alleged to have entered this apartment, preceding the murder, as it is alleged that he stole the murder weapon, and a ring from that location."

Investigation Report of Huneault, Jan. 13/72, Record, Vol. 2, Tab 98, p. 3

408. On January 14, Huneault spoke to Mrs. Arkinson. She confirmed that her apartment had not been broken into, and nothing had been stolen. Huneault was particularly interested in whether a knife had been stolen, whereupon she produced her bread knives which she had purchased 24 years earlier. Huneault concluded his report by saying:

"This last witness Mrs. Arkison is beginning to get elderly and has no information whatsoever which could assist in the investigation of this report."

This last remark suggests that Huneault was ready to ignore information that indicated that Phillion's confession might be false. On February 8, 1972, Huneault reported that Mrs. Roy had telephoned to advise that a Mrs. Rachel Fortin had been a constant companion of Mrs. Arkinson

in 1967, and might know the contents of Mrs. Arkinson's apartment at the time of Mr. Roy's murder. Huneault wrote in his report that the police would follow up on this information. There is no subsequent report to suggest that they did.

Investigation Report of Huneault, Jan. 14/72, Record, Vol. 2, Tab 101, p. 6

Investigation Report of Huneault, Feb. 8/72, Record, Vol. 2, Tab 110, p. 2

(i) *Did Mr. Phillion's confessions contain information likely only known to the real killer?*

409. Phillion's confessions included the following information known to be accurate:

(in the signed confession)

- he correctly described Mr. Roy's profession as being that of a fireman
- he said that Mr. Roy had been stabbed
- he correctly identified 275 Friel Street as the location where Mr. Roy was murdered
- he told Huneault and Nadori that he noticed "a man and a woman" in the building
- he told them he stabbed the man as he was going down the back stairs
- he said that the man was holding him, and he was asking to be let go (according to Mrs. Roy's evidence, the man was saying to her husband that he had done nothing wrong)
- he described the man as "a little heavy set, maybe a little bald, he didn't have too much hair" (Mr. Roy had a slightly receding hairline and was described as "quite stout" by his wife)

(on the first visit to the crime scene)

- he pointed to an apartment on the second floor and said he thought that was the apartment he had gone into. In fact, no apartment had been broken into, and the apartment he indicated was not the one outside which Mrs. Roy had seen the intruder standing. Nevertheless, he knew there was some significance to a second floor apartment.

(on the second visit to the crime scene)

- he re-enacted stabbing Mr. Roy in the area of his heart (left chest area)
- he described encountering Mrs. Roy on the second floor
- he pointed out to the police where he had stabbed Mr. Roy

(to Neil Miller)

- Phillion told Neil Miller that the man he stabbed was the superintendent of the building

Sources of information for Mr. Phillion's knowledge of the murder

410. Insofar as Phillion narrated some accurate facts of the homicide, it is necessary to consider how he could have acquired this information if he was not Mr. Roy's killer. Two overriding factors should particularly be borne in mind:

- Phillion was very familiar with the area in which 275 Friel Street was situated, and Huneault and Nadori told him at the outset of his confession that Mr. Roy had lived at 275 Friel Street.
- Phillion knew on August 13, 1967 that he was a suspect and so, from that time, had a personal interest in Mr. Roy's murder.

Following are ways in which Mr. Phillion may have acquired accurate information about the homicide by the time he confessed to it.

A. Mr. Phillion's arrest in New Liskeard on August 13, 1967

411. Detectives McCombie and Coburn, of the Ottawa Police Force who were in charge of the investigation of Mr. Roy's murder, arrested Mr. Phillion in New Liskeard on August 13, 1967, four days after the murder. Mr. Phillion was questioned about the homicide. Unfortunately, there is no contemporaneous record of this conversation. Detective McCombie testified at the preliminary hearing that Mr. Phillion "was informed of the nature of our investigation with reference to the murder." Detective McCombie did not recall his exact words, nor did he remember whether he told Mr. Phillion how Mr. Roy was murdered. He agreed that this was "possible". He questioned Mr. Phillion "concerning his whereabouts" on the day of the murder. He recorded in an investigation report that Phillion told him he was in New Liskeard at that time.

Evidence of McCombie, Preliminary Hearing, Vol. 4, 382/20-45
Investigation Report of McCombie, Aug. 13/67, Record, Vol. 2, Tab 26

B. The events from August 13 to August 15, 1967

412. On August 13, Detectives McCombie and Coburn drove Mr. Phillion from New Liskeard to Ottawa, a distance of about 500 kilometres. On August 15, Detective McCombie placed Mr. Phillion in a line-up for viewing by the deceased's wife. There is no record of conversations between Mr. Phillion and the officers during this two day period.

C. *Ottawa newspaper reports and conversations
with his mother, and his girlfriend, Gail Brazeau*

413. Mr. Phillion was released from custody on August 15, 1967 after Mrs. Roy failed to identify him in the line-up. (Mr. Phillion has told us that he was released immediately after the line-up. It is known that he was free on bail when his break and enter charge in Ottawa was withdrawn on September 14). His mother lived in Ottawa; his girlfriend, Gail Brazeau, was still in Ottawa. Both lived near 275 Friel Street where Mr. Roy was killed. Mr. Roy's murder was headline news and, no doubt, a topic of considerable local interest and conversation. Gail Brazeau told the New Liskeard police in her statutory declaration that she had read about the murder in the newspaper. Mr. Phillion, himself, knowing that he had been a suspect, would have been very interested in the case. In fact, it would have been consistent with his character for him to have sought out information in the media about the case. He could have gained access to Ottawa newspaper reports from a few days earlier.

414. Everything that Mr. Phillion told the police about the murder that matched the known facts of Mr. Roy's murder was contained in the Ottawa newspaper reports of the case. Following is a comparison table for what Mr. Phillion told the police in his signed confession on January 11, 1972 that was accurate, and the information provided in *one* newspaper article, namely the August 10, 1967 Ottawa Journal report. A continuation of the table reflects a comparison between the same newspaper report and the accurate information provided by Mr. Phillion on his first trip with the police to the crime scene:

Accurate information provided by Phillion in his signed confession of January 11, 1972	The August 10, 1967 Ottawa Journal story
“[I was] going down the back stairs. I noticed a man and a woman”.	“[Mrs. Roy] called to her husband and the intruder bolted for the rear stairs ...”
“I stabbed him”	“A province-wide dragnet is out today for a short, stocky prowler who fatally stabbed the superintendent of a Sandy Hill apartment building after the prowler had been found lurking in a second floor hallway at 3:00 p.m. Wednesday. Leopold Roy, 48, janitor of Churchill Court apartments, 275 Friel Street, died within seconds of receiving a deep knife wound in the heart.”
“I just told him to let me go, he was holding me”.	“Mr. Roy grabbed the man and began struggling with him...”.
The man was “a little heavysset, maybe a little bald, he didn’t have too much hair.”	There was a photograph of Mr. Roy in the Ottawa Journal. (There was a particularly clear photograph of Mr. Roy also in Allo Police on August 20, 1967).
Accurate information provided by Mr. Phillion in the first trip to the crime scene with the police	
According to the police, Phillion pointed to an apartment on the second floor and said he thought that was the apartment he had broken into (the apartment to which he pointed was on the opposite side of the building to the one outside which Mrs. Roy had observed the intruder).	“[Mr. Roy] was in his basement flat when his wife Mildred, 46, found the stranger near the vacant second-floor apartment of a woman tenant who was in hospital ... But police dusted the door of Apt. 14 near where Mrs. Roy first stopped the man, for fingerprints.”
Phillion visually demonstrated to the police how he stabbed Mr. Roy in the heart.	“Leopold Roy ... died within seconds of receiving a deep knife wound in the heart.”

<p>Phillion told the police that after the stabbing he fled through the rear door¹³⁹ of the building onto Besserer Street, ran west on Besserer, and turned south on Friel Street.</p>	<p>“His assailant disappeared after running out the front entrance of the three-storey building. He is believed to have fled south on Friel Street...” “[Mrs. Roy] called to her husband and the intruder bolted for the rear stairs which lead to an alleyway off Besserer Street. ..”</p>
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See Evidence of Huneault, Preliminary Hearing, Vol. 5, 495/1-10
Evidence of Norton, Preliminary Hearing, Vol. 7, 4/45
“Prowler murders Ottawa fireman”, Ottawa Journal, Record, Vol. 7, Tab 1

D. Gail Brazeau moved to New Liskeard

415. Gail Brazeau subsequently moved to New Liskeard where she lived with Mr. Phillion for several months. This provided further opportunity for her to tell him of the knowledge she had gained about Mr. Roy’s murder from living near Friel Street at the time.

E. The New Liskeard Police investigation in April, 1968

416. In early April, 1968, the New Liskeard Police Department conducted an investigation of their own into the homicide. Among other things, they took a statement from Gail Brazeau on April 4, 1968. It was apparent from their questions of her that they knew a great deal about Mr. Roy’s murder. This knowledge presumably came from their dealings with Detectives McCombie and Coburn when they had come to New Liskeard on August 12 - 13, 1967 to pick up Mr. Phillion.

¹³⁹ In fact, Phillion was wrong. The assailant fled through the front door but it is easy to see how Phillion could have made this mistake if he had read the adjacent extract from the August 10, Ottawa Journal.

In fact, as has been seen, the New Liskeard officers had been told about Mr. Phillion's car breaking down in Trenton. Mr. Phillion was in gaol in New Liskeard at this time (he was facing a charge of living on the avails of Ms. Brazeau's prostitution). The same two officers from the New Liskeard Police Department who interviewed Ms. Brazeau on April 4, 1968, then interviewed Mr. Phillion at the local gaol on April 11, 1968. It is unknown how much of their knowledge of the case was imparted to Mr. Phillion at this interview.

F. Events in the 1968 – 1972 period

417. It cannot be known how much information Mr. Phillion acquired, or how much of the information that he had acquired he had since forgotten, about Mr. Roy's murder in the ensuing years from 1968 until 1972.

G. The knowledge of the officers who took the confession in January, 1972

418. It is possible that Detectives Huneault, Nadori and Norton provided, consciously or unconsciously, information about Mr. Roy's murder to Mr. Phillion on January 11, 1972, or provided "clues" from which Mr. Phillion was able to draw conclusions. There is no evidence on the record that this happened, at least not until the second visit to the crime scene at which point the officers effectively acknowledged in their evidence that they assisted Mr. Phillion's "memory".

419. In summary, there were a number of ways and sources whereby Mr. Phillion could have acquired accurate information about Mr. Roy's murder. The newspaper alone contained the accurate information he provided in his confessions, but he likely had much of the information repeated to him on several other occasions.

(ii) *Did Mr. Phillion's confessions contain inaccurate descriptions of mundane details of the crime?*

420. Leo and Ofshe explain why the focus in this regard should particularly be on mundane details of the crime:

“When the police elicit a post-admission narrative from a suspect, they typically seek only information about major crime elements (e.g., location of the missing weapon, type of mutilation, etc.). However, a suspect's report about the mundane (but unique or improbable) details of the crime and the crime scene is of great value in establishing a suspect's guilt or innocence. This is true, in part, because the suspect's knowledge of mundane details is less likely to be the result of contamination by the police. Mundane details are less likely to have been mentioned during off-tape conversations or during the pre-admission phase of an unrecorded interrogation.”

In this context, Phillion's confessions are revealing. He provided numerous mundane details of the crime that were inaccurate. As well, the likely sources of some of the inaccurate details that he provided can be ascertained.

Leo, Richard A. and Ofshe, Richard J., “The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation”, 88 J. Crim. L. & Criminology 429

421. Phillion's confession included the following mundane details known to be inaccurate:

(in the signed confession)

- he claimed that he broke into one of the apartments from which he stole a knife. In fact, no apartment was broken into, and no knife was stolen. The 1972 investigators confirmed McCombie's information from 1967 by speaking to Mrs. Arkison on January 14, 1972,

- he claimed that the deceased “starting coming down at me”. In fact, Mr. Roy came up the stairs towards his assailant,

(in the conversation with Nadori at 3:45 p.m.)

- he claimed that he stole a watch from the apartment he broke into, and that he stole the knife from the kitchen cupboard. In fact, there was no break-in or theft,

(on the first visit to the crime scene)

- he continued to claim that he had broken into an apartment and stolen a knife with which he stabbed Mr. Roy,
- he identified Apartment 18 as the apartment that he broke into. Apartment 14, on the opposite side of the building, was the apartment outside which Mrs. Roy saw the intruder standing,
- he claimed he entered the apartment building through the back door. This seems unlikely as the intruder would have been seen coming through this door by Mr. Roy or Mr. Herbert, the furnace man,
- he claimed that he fled down the main stairs after stabbing Mr. Roy. The intruder, in fact, fled down the back stairs,
- Huneault and Norton differed as to where Phillion claimed to have stabbed Mr. Roy. On either version he, in fact, incorrectly identified the location of the stabbing as to which staircase (Huneault) or as to which floor (Norton),
- Phillion claimed he fled out the back door of the building. In fact, the intruder fled out the front door,

(according to Huneault’s police report of January 13, 1972)

- Phillion claimed that he stole a ring from the apartment that he broke into.

Mr. Phillion repeated some of these inaccurate details even on the second visit to Friel Street by which time his “knowledge” of the crime scene was admittedly assisted by the accompanying police officers.

422. There were numerous inconsistencies between Phillion's "memory" on the first and second visits to the crime scene. In addition, there was a striking inconsistency in his description of the knife. He claimed to Nadori at 3:45 p.m. on January 12 that he stole it from a cupboard in the kitchen of the apartment he broke into. He described it as having a wooden handle, and as being nine inches long with a thin, worn-out blade. At 7:30 the next morning, Norton asked Phillion to describe the knife to him:

Q. Do you remember what the knife looked like?

A. No.

Q. Any idea how long it was?

A. No.

Q. Where in that apartment did you get it?

A. Near the kitchen I guess.

It had, therefore, taken Phillion only 16 hours to forget his earlier description of the knife to Nadori.

Investigation Report of Norton, Jan.12/72, Record, Vol. 2, Tab 97

423. There are likely sources for much of Phillion's inaccurate information.

- His claim that he broke into an apartment was likely influenced by media reports which suggested that Mr. Roy's assailant was a "prowler". Detective McCombie was quoted in the newspaper as saying "I strongly suspect the person may have been a housebreaker caught in the act."
- His claim to have stolen a watch and a ring may have reflected media reports that the police believed the culprit had broken into an apartment or house in the area because they found items of inexpensive men's jewellery in the neighbourhood of 275 Friel Street during police searches.

"Prowler Murders Ottawa Fireman", Ottawa Journal, Aug. 10/67, Record, Vol. 7, Tab 1

"Squads of Police Seek Knife Slayer...", Ottawa Journal, Aug. 11/67, Record, Vol. 7, Tab 4

"Killer's Hair Key Clue in Roy Murder", Ottawa Journal, Nov. 3/67, Record, Vol. 7, Tab 15

424. Phillion also claimed in his confessions that after the murder he went to the Rideau Tavern where he changed clothes, and then fled by car across the Black Bridge:

- the source of Phillion's claim to have stopped at the Rideau Tavern was likely newspaper stories that a knife had been found on August 12, 1967 in the washroom of a Rideau Street Hotel,¹⁴⁰
- the Black Bridge was a railway bridge, and had never transported cars.

Phillion's claim to have thrown the knife in the Rideau River would, to his knowledge, have been consistent with media reports that the police had not found the murder weapon.

"Police Locate Knife, May be Murder Weapon", Ottawa Journal, Aug. 14/67, Record, Vol. 7, Tab 7

"Killer's Hair Key Clue in Roy Murder", Ottawa Journal, Nov. 3/67, Record, Vol. 7, Tab 15

425. By the time Mr. Phillion was purporting to relate the events of the murder, more than four years had passed since it occurred. Consequently, if Phillion was the perpetrator, his memory of the crime might understandably be deficient. Phillion, as well, is an unreliable historian at the best of times. Nevertheless, his memory of events that are known to have never occurred goes beyond this. If he had stabbed Mr. Roy, he would surely have remembered that he did not steal the knife from an apartment in the building where the stabbing took place. But this non-existent event may well have seemed to have been a logical part of the scenario if Phillion was inventing it. He knew that Mr. Roy had been stabbed; he knew that a "proowler" was suspected; he knew that Mrs. Roy had encountered the man outside an apartment on the second floor. The claim that he stole the murder weapon while in the building flows logically from this knowledge. Accordingly, his claim to have

¹⁴⁰ On August 12, 1967, police were called to the Rideau Tavern, and were handed a "five inch bladed dagger" which had been found in the wastepaper basket in the ladies' washroom of the hotel.

Investigation report of Thompson, Aug. 12/67, Record, Vol. 2, Tab 22

broken into an apartment and stolen the murder weapon provides substantial evidence that his confession was false.

(iii) Did Mr. Phillion's confession lead to the discovery of new evidence?

426. Phillion's confessions to the authorities and Neil Miller failed to lead to the discovery of any new evidence. He claimed to have thrown the murder weapon and his clothing into the Rideau River. In his January 13, 1972 report, Huneault wrote as one of his listed "to do" items:

"Item 4, Possibly recovering the murder weapon from the Rideau River where it is alleged that the accused threw it after the murder."

As far as is known, no attempt was made to look for them. Considering more than four years had passed, this was not surprising. The only potential forensic link between Mr. Roy and his assailant, hairs seized from Mr. Roy and his clothing, and scrapings of his fingernails, had been discarded or lost by 1972.

Investigation Report of Huneault, Jan. 13/72, Record, Vol. 2, Tab 98

(iv) Miscellaneous matters pertaining to the truth or falsity of Mr. Phillion's confessions

427. There are a number of miscellaneous matters to be considered in any assessment of the truth or falsity of Mr. Phillion's confessions.

A. *Mr. Phillion's repudiations of his confessions within hours of making them*

428. Since January 12, 1972, Phillion's repudiations of his confessions have been consistent and categorical to all who would listen. Dr. Gudjonsson commented in his report on this:

"...in spite of Mr. Phillion's apparent acquiescence and eagerness to impress, he clearly has a stubborn streak and rigidity in his character. This was evident on various occasions during the assessment, including in relation to his proclaiming his innocence and refusal to accept parole. For example, he was very adamant about his innocence, repeatedly stated it with great emotional intensity, and became distressed and agitated when I did not readily agree with him. Mr. Phillion is totally pre-occupied by his case. He is a self-centered man who tends to become fixated on certain issues at the expense of being able to grasp all the components, complexities, and consequences of a given reply or action. I also noted this kind of behaviour when listening to the tape recording of his National Parole Hearing, dated 11 January 2002. Mr. Phillion is not an easy man with whom to communicate; his conversations are all focused on himself, his own needs and self-importance.

....

Since his conviction in 1972 Mr. Phillion has harboured a great deal of resentment towards his incarceration. He has remained extremely adamant and consistent through his prison sentence that he is innocent of murdering Mr. Roy. He has made determined, and sometimes life threatening attempts, to get people to listen to his claims of innocence. In addition, he is currently refusing parole as a protest against his conviction. There are three possible explanations for Mr. Phillion's post-conviction behaviour. Firstly, he is being extremely manipulative and is trying to be released under false pretences. This is, of course, a possibility, but I think it is unlikely to be a true scenario and there is no direct evidence to support it. In contrast, Mr. Phillion's commitment and determination to prove his innocence is impressive and should not be underestimated. It is consistent with other cases of wrongful conviction (Gudjonsson, 2003). Secondly, it could be claimed that Mr. Phillion has come to persuade himself that he is innocent of the murder when in fact he is guilty. There is no evidence for this proposition and it is clear from the documents in the case that he has never expressed any doubts about his innocence. From the time he made the confession he has insisted on his innocence. Thirdly, it may be that Mr. Phillion is truly innocent, is outraged by his wrongful conviction, and is trying to get the establishment to accept his claims of innocence. The extent to which Mr. Phillion has gone to get people to listen to his claims of innocence is consistent with him having been wrongfully convicted. Out of the three possible scenarios, I think this is the most likely one."

429. The speed with which Mr. Phillion retracted his confession *to officers of the same police force and in the same police station* is significant. The jury only heard a little of this, from P.C. Couture. There can be no doubt that the exclusion of Mr. Phillion's other recantations prejudiced his defence significantly. Exclusion of exculpatory statements pursuant to the evidentiary rule against admitting self-serving statements was criticized in a somewhat different context by Commissioner Kaufman in his Report on the *Morin Inquiry*. The Minister has the benefit of considering everything Phillion said to the police on January 11 and 12, 1972. When the confessions are viewed in context, their reliability diminishes dramatically. Particularly compelling is that Phillion goes from confessing to Huneault, Nadori and Norton, to denying his confession to Couture (and on the telephone to his mother), to implicitly admitting and then denying his confession all in one short conversation with Norton, and then denying his confession thereafter to Aldrich and Bayne. Apart from Couture, the jury was denied the benefit of hearing this evidence. Its overall relevance today is obvious in any consideration of the truth or falsity of his confession.

Report on "The Commission on Proceedings Involving Guy Paul Morin", 1998, Vol. 2, 1151-1157

430. Dr. Gudjonsson viewed Phillion's retractions as significant:

"Mr. Phillion retracted his confession very soon after making it. His own estimate of when he retracted the confessions varies from "a few minutes" to an hour or so. What is known from the police records is that after the second visit to Friel Street, and before he was charged with the murder, he was telling his mother that he had lied to the police about his involvement in the offence. Later that same evening, when asked by an Officer what he had to do with the murder, he replied "nothing at all." The speed with which Mr. Phillion retracted his confession to the police, and the content of his retraction, are significant. The following morning, Constable Aldrich observed Mr. Phillion make the following comment in the Cell Block: "I am a real nut to confess to a murder that I never even committed." This sounds like genuine and spontaneous retraction. It suggests that he was confessing to the murder under duress, for some instrumental gains, or for a combination of reasons."

Report of Dr. Gudjonsson, Record, Vol. 16, Tab A,1

B. Mr. Phillion's persistent retractions of his confession since January, 1972

431. In the 31 years since he confessed to Detectives Nadori and Huneault, Romeo Phillion has persistently denied that he committed the murder, and has been adamant that his confession was false.¹⁴¹ As Dr. Gudjonsson stated in his report, this sort of behaviour is consistent with other observed cases of wrongful conviction.

While awaiting trial for murder

- On January 13, 1972, Detectives Nadori and Huneault visited Phillion's mother Yvonne, at her home on 46 Nelson Street. According to Nadori's report of the interview, Mrs. Phillion told the officers she had visited Romeo that day in the county jail. He was in a "highly emotional" state and told her that he had not committed the crime, and that at the time it occurred he had been with his girlfriend. He also told her that he had not been abused by the police and he did not know why he confessed.

Investigation Report of Nadori, Jan. 13/72, Record, Vol. 2, Tab 99, p. 3

- On January 13, 1972, Phillion was interviewed by Dr. Blair, a psychiatrist, to determine his fitness to stand trial. In his January 24, 1972 report, Dr. Blair related that Phillion told him he was "a lonely type and he wanted the publicity and he wanted to send 'the cops on a wild goose-chase.'" He also told Dr. Blair that he liked to "'make stories up' - 'to get some attention.'"

Report of Dr. Blair, Record, Vol. 14, Tab 24

¹⁴¹ In his report, Dr. Turrall has provided a helpful list of many of Mr. Phillion's denials to mental health professionals.

Report of Dr. Turrall, Record, Vol. 16, Tab B,1, pp. 4-12

- On February 2, 1972, Phillion was interviewed at the county jail by Dr. Arboleda. Dr. Arboleda testified that, during the interview, Phillion told him essentially the same thing: “[that] he had not done what he confessed he had done and insisted again he wanted to gain some publicity.”

Evidence of Dr. Arboleda, Vol. 6, 1235/1-10

- On March 10, 1972, following the evidence of Mrs. Roy at the preliminary inquiry, Phillion made a statement to Detective Sgt. Norton and Detective Coburn. He told them that, in 1971, after implicating his brother Donald in the homicide to Detective McCombie:

“[Then] I decided to get myself charged with it in order to hear Mrs. Roy’s testimony but I decided to wait. January 10th 1972 I decided to go through with it. I made a false statement on it and I wanted the police to sort of believe me that I was the one. Now I want to go to court and hear the only witness say what really happened. What she said on that stand did not fit me but fitted [*sic*] the person in question. So I guess that is all.”

Statement of Romeo Phillion, Mar. 10/72, Record, Vol. 14, Tab 4

- On May 16, 1972, on Phillion’s first psychiatric remand to the Penetanguishene Mental Health Centre, C. Schmitz recorded that in her interview with Phillion he told her that he had met the real killer, and that the police had “bugged” him to reveal the man so that they could close the case. He told her that he had played “their game” and incriminated himself for publicity. He was certain that the police would withdraw the charges, and had told them to withdraw the charges the day after he confessed. Phillion told her that he expected the actual killer to come forward, and that only he and his lawyer knew who this person was, since his lawyer had also represented the actual murderer. Phillion told Mrs. Schmitz that he had killed 3 people in the last two years, but “not the fireman.”

Report of C. Schmitz, May 16/72, Record, Vol. 6, Tab 3

- On September 20, 1972, on his second remand to Penetang, Mrs. Schmitz recorded another interview with Phillion in which he stated he was not guilty of the charge, and said that he admitted to the murder under the influence of drugs. Schmitz recorded that Phillion was

paranoid towards the police who he said tried to frame him, and towards his “friends” who he claimed were bribed by the police.

Report of C. Schmitz, Sept. 20/72, Record, Vol. 6, Tab 84

- On October 28, 1972, Phillion was examined by Dr. Girodo. While there is no record of what Phillion actually said to Dr. Girodo, Dr. Girodo concluded that Phillion had an anti-social personality and that confessing to “something big like murder” would be in keeping with his extreme search for a negative identity.

Evidence of Dr. Girodo, Vol. 5, 1077/20-30

- On October 28, 1972, Phillion was interviewed a second time by Dr. Arboleda, and continued to maintain his innocence. On this occasion, he was administered sodium amyto.
- On November 2, 1972, Phillion underwent a polygraph test conducted by John Reid. He was asked the following “relevant questions”:

On August 9th, 1967 did you wrestle with Leopold Roy at 275 Friel Street?

...
Did you stab Leopold Roy on August 9th, 1967?

...
On August 9th, 1967 were you trying to enter an apartment at 275 Friel Street?

...
Did you kill Leopold Roy on August 9th, 1967?

...
On August 9th, 1967 did you meet Leopold Roy on a stairway at 275 Friel Street?

Phillion responded “no” to each question.

Evidence of Reid, *Voir Dire*, Vol. 6, 1165/35 to 1166/5, 1169/15-25

- It is obvious from the way Mr. Cogan conducted his defence, which included having Phillion take a polygraph, that Phillion had told him that he was innocent and his confession was false.

- In his “Post-Sentence Report”, prepared December 1, 1972, M. Newton, a senior probation officer, wrote:

“He presented himself as a very dejected individual, one who had given up all hope and repeatedly stated to us – “I did not commit this crime”.”

Post-Sentence Report, Record, Vol. 15, Tab 27

*Following conviction, to the Correctional Service of Canada,
the National Parole Board and Penetang Officials*

- On February 1, 1973, while at Kingston Penitentiary following his conviction for murder, a psychiatric report (author unknown) recorded that Phillion “claims he did not commit this offence and signed a confession to the police for no good reason. He is very bitter about conviction and threatens suicide if his appeal not upheld.”

Kingston Penitentiary Psychiatric Report, Feb. 1/73, Record, Vol. 6, Tab 86

- On July 11, 1973, while on remand to Penetanguishene awaiting trial for his outstanding robbery charge, C. Schmitz recorded that Phillion believed he was convicted of the murder because the judge “brainwashed” the jury, and that he denied committing the offence.

Report of C. Schmitz, July 11/73, Record, Vol. 6, Tab 90

- Phillion’s correctional records from 1972 to 1981 are missing from the records that have been retrieved from the Correctional Service of Canada. However, since 1981, Mr. Phillion’s psychological, corrections and parole documents are full of references to his claims of innocence.

See Record, Vols. 4 and 5

To the Department of Justice

- In 1991, Phillion began a voluminous correspondence to the Department of Justice and the Minister in which he repeatedly asserted his innocence, claiming that he falsely confessed and accusing the police of suppressing evidence.

See Record, Vol. 8

To Previous Counsel

- Phillion was persistent in claiming he was innocent and that his confession was false to Mr. Crane, his appellate counsel. In 1992, Mr. Crane wrote a 9 page letter to the Minister of Justice which formed the basis of his original section 690 application.

Letter from D. Crane to K. Campbell, Feb. 4/92, Record, Vol. 3, Tab D,1

The Second Polygraph

- In 1997, at the suggestion of Mr. Parish and Mr. Crane, Phillion took a second polygraph test, conducted by Mr. Russell, a retired polygraph examiner from the RCMP. Mr. Russell formed the opinion that Phillion was telling the truth when he said that he did not “inflict the injuries that caused the death of Leopold Roy” or “stab Leopold Roy” on August 9, 1967. Mr. Russell also noted that, in the pre-interview, Phillion told him he had recanted his confession shortly after writing his statement to police.

Report of Russell Polygraph Services, Mar. 12/92, Record, Vol. 15, Tab 14

To Dr. Gudjonsson and Dr. Turrall

- Most recently, Phillion has told Dr. Gudjonsson and Dr. Turrall that he is innocent.

Report of Dr. Gudjonsson, Record, Vol. 16, Tab A,1

Report of Dr. Turrall, Record, Vol. 16, Tab B,1

To the Media

- Mr. Phillion has insisted on his innocence to members of the news media. He has been interviewed by Kirk Makin of the *Globe and Mail*, and by Anne Panasuk of Radio-Canada's newsmagazine show, *Zone Libre*.

C. *Inferences that can be drawn from the two trips to the crime scene*

432. The evidence of the police officers in which they described their two visits with Phillion to the crime scene are revealing. On the first visit, at which time, the officers testified, they knew little or nothing of the murder or crime scene, Phillion purported to re-enact the homicide in a manner that, according to Detective Nadori "was completely opposite of what is actually supposed to have taken place... he led us to places in the apartment building that had no significance whatsoever." To suggest that Phillion was improvising as he went along would be a fair portrayal of what Phillion did and said on this first visit.

See paragraphs 119 to 126 (*supra*)

433. On the second visit, by which time the officers acknowledged they were familiar with the file and took photographs of the crime scene with them, Phillion was able to present a somewhat more accurate "re-enactment" of the crime. In the circumstances, this is not surprising. The officers were, by then, very conscious of the problems presented by what Phillion had said and done on the first visit. In his report, Dr. Gudjonsson states:

"It is unlikely that the further information emerging during the second visit was due to Mr. Phillion suddenly being able to recall more about the crime scene. Relevant here is Mr. Phillion's abnormally high suggestibility, acquiescence and compliance, which are psychological vulnerabilities of his which are likely to have been present when he was interviewed by the police in 1972.

Report of Dr. Gudjonsson, Record, Vol. 16, A,1

434. It can be inferred that Phillion was improvising on both visits to the crime scene, and was picking up hints of information from the police when he could, especially on the second visit.

D. Mr. Phillion's readiness to do whatever is requested of him in order to establish his innocence

435. Since his arrest, Mr. Phillion has shown remarkable willingness to do whatever has been requested of him in order to establish his innocence. Over the course of 31 years, he has discussed his case with numerous mental health professionals. This began with his examination by Dr. Blair only 48 hours after his confession, followed by his two pretrial hospitalizations at Penetang. Thereafter, he has been examined countless times by professionals. Some of their reports implicitly suggest acceptance of Phillion's retraction of his confessions; none explicitly seek to refute his retraction. For example, on July 25, 1973, Clinical Director Lorne Carpenter of the Penitentiary Service advised the Mental Health Centre at Penetang:

“Some people who know Phillion well feel that he did not commit the murder ... [the letter went on to explain how Phillion provided information to the police about the CARP murders and continued] he heard about the unsolved murder in Ottawa and, after learning all the details of same, went to the police and confessed to it. This was his way of punishing himself for what he had done to his brother.”

Report of Dr. Carpenter, July 25/73, Record, Vol. 6, Tab 99

436. As early as 3:00 p.m. on January 12, 1972, Phillion had already discussed taking a polygraph with his lawyer which he then spoke about to P.C. Aldrich, one of the custodial officers. He agreed to take sodium amyto; he agreed to take a polygraph in the midst of his trial; he took a second

polygraph in 1997. In *B.(S.C.)*, the trial judge had allowed the defence to lead evidence at the accused's sexual assault trial that he had offered to undergo a polygraph test. He had not, however, actually taken one. The defence also led evidence that the accused had voluntarily provided bodily samples and clothing to the police. On a Crown appeal from the accused's acquittal, the Ontario Court of Appeal considered the admissibility of this type of evidence, evidence of consciousness of innocence. Doherty J.A. said:

“Evidence that an accused offered to take a polygraph test has probative value only to the extent that it reasonably yields the inference that the accused was prepared to do something which a guilty person would not be prepared to do. In fact, an accused who offers to take a polygraph test risks nothing since the results are inadmissible: *R. c. Béland* (1987) 36 C.C.C. (3d) 481 (S.C.C.) at 494-95. An inference favourable to the accused from such an offer could only be drawn if, despite the inadmissibility of the results, the accused believed that a negative test result could be used against him at trial. There is no evidence that the respondent had any such belief.

Even if there was evidence that an accused believed that a polygraph test result could be used against him, the admissibility of a mere offer to take the test is still problematic. An offer to take the test is hardly an unequivocal act. Its probative value depends on a number of factors. What did the accused know about the accuracy of the test? Did the accused believe he could “fool” the machine? What advised did the accused have before making the offer? Was the offer a *bona fide* one? These and other possible considerations could lead to extensive inquiries into matters which are far removed from the question of the accused's culpability in the offence charged. Evidence proffered by the defence will be excluded where its probative value is substantially outweighed by its prejudicial effect on the proceedings: *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 at 391 (S.C.C.). In many cases, evidence of a mere offer to take a polygraph test will not pass that threshold of admissibility: *R. v. Richards* (1997), 6 C.R. (5th) 154, at 161-63 (B.C.C.A.); *McCormick on Evidence*, 4th ed. (1992), Vol. 1, at p. 913; B.K. Carpenter, “Propriety and Prejudicial Effect of Comment or Evidence as to Accused's Willingness to Take a Lie Detector Test” (1963), 95 A.L.R. 2d 819

.....

The admissibility of after-the-fact conduct by an accused to support an inference that an accused did not commit the crime alleged should be approached on a principled basis. If the evidence is relevant, its probative value is not substantially outweighed by its prejudicial effect and it is not excluded by some policy-driven exclusionary rule, the evidence should be received when proffered by the defence: *R. v. Watson* (1996), 108 C.C.C. (3d) 310 at 327 (Ont.C.A.).”

437. Applying Doherty J.A.'s reasoning to the facts of our case:

- Phillion undertook a polygraph twice without equivocation. His offer to take the test, therefore, proved to be *bona fide*,
- he took the test in 1972 with his counsel's full knowledge and assistance; in reading his counsel's strenuous arguments for the admissibility of the results, which continued up to the Supreme Court of Canada, it is clear that Mr. Cogan at least told Mr. Phillion that the results might be admitted into evidence,
- in 1972, when he took the test, Phillion knew that Dr. Arboleda and Dr. Girodo were prepared to give evidence to support his defence that his confession was false. Phillion would have known that a deceptive result would likely impact their pre-existing opinions, especially since Dr. Arboleda had recommended that Phillion should take a polygraph,
- in 1997, when he took the test again, Phillion knew that the Minister's powers under Section 690 are viewed as discretionary, and that the Minister might decide to consider the results of a second polygraph, good or bad, in exercising his discretion.

If Phillion were to be tried today, his willingness to take the polygraph test (but not the results) would be admissible. It not only demonstrates a consciousness of innocence on his part, but also provides an appropriate response to the prosecutor's claim that his guilt was proven through words from his own mouth.

E. The evidence of Neil Miller, and the confessions to him

438. The evidence of Neil Miller can be viewed as a layperson's opinion that Romeo Phillion was a person who liked to think he was "a big man", boasted of things that he had never done, and thought that the image of being a murderer would impress people. In Miller's experience, one never knew whether Phillion's claims were true or false. This opinion, from the person who was probably closest to Romeo in January, 1972, is significant.

F. Is there a common sense rationalization for Mr. Phillion to have confessed (a) truthfully or (b) falsely?

439. It is difficult to rationalize why Phillion would have confessed to murdering Mr. Roy if he had, in fact, committed the crime. Almost five years had passed since the homicide so he would have had every reason to think that he had got away with it. From his early conversation with Huneault, he was unsure whether he could be hanged for the crime. He was already in considerable trouble on January 11, 1972, having been arrested for the robbery of a taxi driver at gunpoint. He had no reason to believe that Neil Miller had told the police of his confessions to him. In these circumstances, the only rational explanation for his confession would be a confession arising from a sense of guilt. But this explanation neither fits the character of the man – all the mental health experts gainsay that Phillion would have had a sense of guilt in 1972 if he had committed the crime – nor his retractions that commenced hours later. At a minimum, it might be expected that he would have felt the same sense of guilt some time in the ensuing 31 years. No such thing has

occurred. Dr. Gudjonsson stated that he was “far from satisfied” by arguments for the proposition that the confession was truthful.

Report of Dr. Gudjonsson, Record, Vol. 16, Tab A,1, at pp. 25-26

440. Rationalizing why Phillion would have falsely confessed to murdering Mr. Roy is not difficult. Consistent with the way his lover Neil Miller described him, he would have confessed to suit his own purposes. He could have thought that he would make the police look silly if they charged him – since he did not commit the crime, he probably never even considered that he could be found to have committed it. He was angry with the police; he was facing a serious robbery charge; there was a reward out for solving the crime. In his words to P.C. Couture:

“I wanted to get even and send them on a wild goose chase.”

He also told P.C. Couture that he wanted Neil Miller to get the reward, a reminder that Romeo himself had received a reward for turning in his brother on the Carp murders. He seemed preoccupied that there was a \$14,000.00 reward “on him” for the taxi driver robbery. He told his mother on the telephone, in a conversation overheard by Couture, that:

“I said anything so that Neil would collect the reward. Things are going to change in court tomorrow. I was so fed up that I said anything. I will say the whole truth tomorrow and it should change everything. Neil should collect the money.”

In fact, Phillion did try, through his mother and personally, to speak to Huneault and Nadori on January 13 and 14 but his lawyer intervened to prevent it.

Evidence of Couture, *Voir Dire*, Vol. 2, 446/30-40

441. Phillion's interest in having his name in the papers should also not be ignored. He knew the publicity generated by the murder in 1967; he would have realized the publicity around his name if he were charged with the murder, even if only for a few hours, (coupled with his belief that he could make the police look silly in the process). This may well be why he asked P.C. Couture for a newspaper to read (one of the Ottawa papers apparently had an evening edition at the time) because, when Couture refused, he asked if there was something about him in the paper. Later Couture overheard him telling his mother on the telephone to "listen to me on the news".

Evidence of Couture, *Voir Dire*, Vol. 2, 446/40

G. Mr. Phillion's March 25, 1971 conversation with McCombie

442. It is known that Mr. Roy's murder was on Phillion's mind on March 25, 1971. That day, he walked into the Detective Office¹⁴² and told McCombie that his brother Donald wanted to confess to Mr. Roy's murder, and that Donald would tell him

"... where the knife was and of the stealing of a car immediately after the murder and abandoning it in the Pembroke area."

Contemporaneously, he had made a similar claim to Charles King, a newspaper reporter.

Investigation report of McCombie, Apr. 2/71, Record, Vol. 2, Tab 88

Charles King, "Twins Behind Bars" A Case History", Ottawa Citizen, Record, Vol. 7, Tab 32

¹⁴² It is unknown whether his visit to see Detective McCombie had been pre-arranged. Since McCombie was there, it seems it may have been.

443. There is no reason to believe that Donald Phillion was the man who stabbed Mr. Roy to death. In August, 1967, McCombie and Coburn were satisfied that he could not have been in Ottawa on August 9 because work records established that Donald was working in New Liskeard that day.¹⁴³ Donald reminded Huneault and Nadori of this when they interviewed him at Archambault on January 24, 1972. Romeo himself was to later accuse another man of the murder, when he gave a statement on March 10, 1972. It may be that Romeo was making up a story (to seem important, or for the reward as Charles King suspected), or that Donald falsely confessed to Romeo (to be transferred out of Archambault prison as part of an escape attempt as McCombie suspected). The incident is important because it shows that Romeo was thinking about the case in March, 1971 and was giving conflicting stories to the police in March, 1971 and January, 1972, only one of which, the confession, the police were prepared to attribute as the truth.

Investigation report of Nadori, Jan. 25/72, Record, Vol. 2, Tab 109, p. 2

H. A series of exchanges between the Haileybury OPP and the North Bay Police in April, 1968

444. On March 19, 1968 Phillion was arrested by the New Liskeard Police Department for assaulting his sister, Lucille. He was further charged with living on the avails of prostitution. He

¹⁴³ The Crown apparently had some concern that the defence might suggest Donald had committed the murder. In a handwritten list of "Additional witnesses", Mr. Lindsay included

"Someone from garage McConnell Motors where Donald worked to I.D. time card"

"Re Trial Additional witnesses", Record, Vol. 12, Tab 4

was denied bail, and was held at the Haileybury Jail. On March 31, 1968, the Haileybury OPP contacted the North Bay Police Department to inquire about break-ins in North Bay in March, 1968.

The Haileybury OPP advised North Bay:

“OK We have one Phillion in jail here now and he is singing regarding items stolen B and E your city want to make sure of what is true and what is made up before statements are taken from him.”

North Bay responded that they would provide a complete list of break-ins for the period. They then advised of a television stolen from a car on March 27, 1968.

Telex between New Liskeard Police and North Bay Police, Mar. 31/68, Record, Vol. 2, Tab 72

445. No charges ever resulted from this investigation. The Haileybury OPP's fear that Phillion might be making up stories seems to have been well-founded. Assuming this is so, the incident can be viewed as another example of Phillion taking pleasure in sending police officers on a “wild goose chase”.

(b) An Expert Analysis of Phillion's Confessions

446. Romeo Phillion's confessions were the subject of examination by a psychiatrist and a psychologist in 1972. In a sense, Dr. Arboleda and Dr. Girodo were ahead of their time. There was virtually no literature on false confessions in 1972 but, by their examination of Phillion's personality, they were able to conclude that Phillion's confession was likely false. Their evidence focused on the typed confession that Phillion gave because the jury had no knowledge of the two

trips to the crime scene, or of his recantations except the one to P.C. Couture.¹⁴⁴

447. The review of the case conducted by Dr. Gisli Gudjonsson, the world's leading expert on false confessions, and by Dr. Graham Turrall, a psychologist of considerable stature who has reviewed the literature of false confessions, provides significant additional support for the view that the confessions were false. Both doctors had the benefit of reviewing the case as a whole, without "admissibility" restrictions, spent considerable time with Romeo Phillion himself, and were able to review an extensive history of his encounters with mental health professionals which pre-dated 1967, which included the period from 1967 to 1972 (during which he made no claim to have committed the murder), which re-commenced two days after his January, 1972 confession, and which have continued to the present day. The admissibility of their evidence in a criminal trial today is discussed in Appendix 2. The Minister is urged to review this case with the broadest approach possible so as to be able to fully explore and identify the miscarriage of justice in this case.

(i) Dr. Turrall's report

448. Dr. Turrall conducted a neuropsychological assessment of Mr. Phillion. He reviewed his past psychological records. He concluded as follows:

¹⁴⁴ The original reports of Drs. Arboleda and Girodo (assuming they prepared reports for Mr. Cogan) have not been found. No doubt they had been briefed by Mr. Cogan on the two visits to the crime scene, and the several recantations made by Phillion to custodial officers during the night.

“Consistent with his previously diagnosed personality configuration in which he has been diagnosed as having antisocial personality disorder and borderline personality disorder, clinical observations and psychological interview noted that Mr. Phillion continues to demonstrate some antisocial and borderline personality features. A review of his past psychiatric and psychological records noted that Mr. Phillion had been evaluated by several practitioners on several occasions since his admission to custody. The results of his past evaluations repeatedly referred to Mr. Phillion as an immature, impulsive, attention seeking, intellectually limited, inadequate, dependent, depressive and antisocial individual. Given all available information and the results of this psychological assessment, I concur with the above description of Mr. Phillion. His personality traits fit the type of person who could confess to a crime that he did not commit, especially a serious and high profile crime like the unsolved murder of Mr. Roy.”

Report of Dr. Turrall, Record, Vol. 16, Tab B,1, p. 20

449. Dr. Turrall reviewed several psychological perspectives on the case including Phillion’s need for attention, his poor judgment, and his self-aggrandizement. He considered Phillion’s confessions to the police, and to Neil Miller:

“Personality configuration identified Mr. Phillion as a dependent and depressive individual with a tendency for attention seeking behaviours and impulsivity. Personality functioning is suggestive of an individual who needs to be seen by others as important and special. Historically this need for attention and recognition in part is judged to be Mr. Phillion’s attempt to elevate himself from the reality that he was inadequate and incompetent as a person. Mr. Phillion’s impulsiveness, poor judgment and impaired insight exacerbated this basic personality style. Such an individual would therefore be prone to exaggerate or fabricate with the expectation that some type of recognition could be forthcoming to him even if the statements he made to others were false. Mr. Phillion’s documented history attests to his fabrication and embellishment of the truth to the extent that people in authority have often stated that Mr. Phillion cannot be believed.

For example, prior to his arrest Mr. Phillion suggested to his 17 year old lover, Mr. Miller that he killed Mr. Roy. This statement coming from such an individual with his personality makeup would be immediately suspect as an attempt at self aggrandisement. Similar statements were made to the police during questioning following Mr. Phillion’s arrest in January, 1972. After being placed in a cell following the signed confession, custodial officers recorded that Mr. Phillion asked to see a newspaper. A person with Mr. Phillion’s personality configuration would have revelled in his media recognition.”

Report of Dr. Turrall, Record, Vol. 16, Tab B,1, p. 2

(ii) Dr. Gudjonsson's report

450. Dr. Gudjonsson has extraordinary credentials for a case which includes an alleged false confession. He has been involved in correcting many of the most notorious wrongful convictions in the United Kingdom. He was a consultant in the cases of the Guildford Four and Birmingham Six, cases of false confessions. He testified in the Court of Appeal in the cases of

<i>Engin Raghıp</i>	(1991)	6 years in prison
<i>Judith Ward</i>	(1992)	18 years in prison
<i>The UDR Four</i> (Northern Ireland)	(1992)	9 years in prison
<i>Idris Ali</i>	(1994)	4 years in prison
<i>Andrew Evans</i>	(1997)	25 years in prison
<i>Patrick Kane</i> (Northern Ireland)	(1997)	7 years in prison
<i>Derek Bentley</i>	(1998)	hanged in 1953
<i>Donald Pendleton</i>	(2000)	15 years in prison
<i>Darren Hall</i>	(2000)	11 years in prison
<i>Peter Fell</i>	(2001)	17 years in prison
<i>Shane Smith</i>	(2003)	8 years in prison

all cases of false confessions. He has also testified in cases in the United States, Norway, Israel and at The Hague. He has written extensively in the field. Further commentary on his international reputation is provided in Appendix 2.

451. Dr. Gudjonsson defined his task as providing a psychological analysis of the confession and of Romeo Phillion himself.

A. Dr. Gudjonsson's findings regarding Mr. Phillion's personality insofar as it relates to his confession

452. Dr. Gudjonsson made a number of findings about Phillion's personality which are relevant to whether he is/was the type of person to confess falsely to a crime. He found that Phillion was a person likely to confabulate, who was highly suggestible, with an antisocial personality disorder and poor self-esteem. He noted that Phillion's clinical profile since 1961 had been consistent with this:

"... the consistency in the clinical profile since 1961 suggests that Mr. Phillion has serious personal and emotional problems of long duration. These include mood disturbance, negativism, poor self-esteem, emotional and paranoid sensitivity, anger problems, passive aggressive tendencies, bodily preoccupation and health concerns, and interpersonal problems. These problems are chronic and prognosis in terms of treatment intervention is likely to be poor."

Report of Dr. Gudjonsson, Record, Vol. 16, Tab, A,1, p. 17

453. Dr. Gudjonsson found Mr. Phillion to be pleasant and cooperative during the assessment.

However, he noted what he considered to be unusual features to his demeanour:

"Firstly, in spite of Mr. Phillion being reasonably bright intellectually on psychological tests, he did not seem articulate and often appeared to have problems processing cognitively the questions asked and giving a proper answer. This did not appear to relate to his being either defensive or evasive. He was spontaneous and forthcoming in his answers and appeared to be genuinely trying to answer questions to the best of his ability. However, he sometimes replied impulsively to questions, did not always answer the question asked, got fixated on certain points and was unable to see the broader picture, was highly acquiescent at times, often gave incoherent or unclear answers, and seemed to become emotionally entangled in some of the questions. This was interfering with his ability to give clear, coherent and reliable answers."

He found Phillion to be “boastful at times and was eager to please and impress me”. Nevertheless, he reports that Phillion has

“a stubborn streak and rigidity in his character. This was evident on various occasions during the assessment, including in relation to proclaiming his innocence and refusal to accept parole.”

Report of Dr. Gudjonsson, Record, Vol. 16, Tab A,1, p. 18

454. Dr. Gudjonsson made interesting observations about Phillion’s reliability as an historian.

He writes:

“Fourthly, Mr. Phillion seemed to be trying hard to give a complete, accurate and honest account of events. Even though it is evident from his record that he is an unreliable historian, I did not form the impression or find evidence that he was necessarily deliberately trying to mislead me. Rather, it came across as if he believed in what he was telling me, even if this was done in a very naive and self-deceptive fashion. For example, on a number of occasions he made blatant denials about having said various things that are in the records, including those he had signed. For example, when I asked him about a statement he had given to the police on 10 March 1972 where he claimed to have met in prison the murderer of Mr. Roy, he denied ever having said it. I showed him the statement and he claimed it was a fabrication. He pointed to the signature and stated that it was not anything like his own signature. I asked him to write down his own signature for me in my notebook, which he did. It looked very much like the signature on the statement. I then asked him to sign his name again underneath the signature on the statement. Immediately after doing [this] he looked at both signatures and uttered in surprise, “some of the letters are the same.” He looked very baffled about this, but accepted that the two signatures looked alike. He still denied having made the statement and claimed to have told his solicitor about this forged statement when he first saw it in 1991. I asked him if he knew who had murdered Mr. Roy. He replied that he did not, but stated that there was this person he had met in prison whom he suspected of the murder, because the man was 5 foot and 3 inches tall and had “black curly hair.”

Similar to the position taken in this brief, Dr. Gudjonsson placed little or no reliability on details of events as described by Mr. Phillion, including his dealings with the police when he confessed, and his explanations today for falsely confessing.

Report of Dr. Gudjonsson, Record, Vol. 16, Tab A,1, p. 19

B. *Mr. Phillion's confession to Neil Miller*

455. Like Dr. Turrall, Dr. Gudjonsson focused on Phillion's confessions to Neil Miller as well as his confessions to the police. He writes in his report:

"Why should Mr. Phillion have confessed to the murder to Mr. Miller, if it was not true? There are at least two possibilities. Firstly, and probably most importantly, he wanted Mr. Miller to think he was "a big guy." He was seeking a sense of notoriety as a way of enhancing his low self-esteem. There is evidence from Mr. Miller that Mr. Phillion was in the habit of bragging about offences and "always was a man for making many stories and living in a world of fantasy". This is consistent with Mr. Phillion's psychological profile. The murder of Mr. Roy was undoubtedly notorious in Ottawa in view of his position as a fireman. Mr. Phillion knew he had been a suspect in 1967 and he appears to have been obsessed with the case prior to his arrest in January 1972 (e.g. he continued to contact Detective McCombie and falsely implicating others, including his twin brother - this suggests an attention seeking behaviour). *Secondly, Mr. Phillion may have wanted Mr. Miller to feel frightened of him as a way of exercising control over Mr. Miller.*

In view of this, it is unsafe to rely on the confession that Mr. Phillion made to Mr. Miller about the murder of Mr. Roy." (emphasis added)

In his January 11, 1972 investigation report, Huneault summarized the interview that he and Nadori conducted with Miller on that date:

"The contents of the witness statement by Miller indicate that he had known the accused Phillion since approx. Sept. 1969, that he (Miller) was a homosexual, and that he and Phillion took up residence at several locations, and had numerous domestic quarrels, between that period of the time in Sept. 1969 to approx. one week ago.

He relates numerous beatings at the hands of Phillion, and on three different occasions having discussed with him (Miller) the charge or suspected of the Leopold Roy murder, on the first occasion having denied being responsible, however on the second and third occasion having indicated to Miller that he was responsible for that particular murder *and at the same time was using this as a threat to him, for leaving him.*" (emphasis added)

C. *Mr. Phillion's confession to the authorities*

456. Dr. Gudjonsson begins his review of Phillion's confessions to the authorities as follows:

It is evident from reading the various documents in the case that Mr. Phillion has given varied explanations for his confession to the police. What has remained completely consistent since the time of his initial retraction is his claim that he made a false confession to the police and his determined effort to get people to listen to him and treat his case like a miscarriage of justice. The significance of this consistency over such a long period of time should not be underestimated. It has undoubtedly hampered his progress during the prison system and delayed his transfer back into the community. A similar pattern of behaviour and determination has been seen in British cases of miscarriage of justice involving unreliable confessions (Gudjonsson, 2003)."

He considered, and rejected, the likelihood that Phillion confessed out of feelings of remorse, or inevitability due to his having confessed to Miller. He states:

"The speed at which Mr. Phillion retracted his confession is not consistent with a genuine confession that resulted out of feelings of remorse or the belief that there was no point in denying the offence because the police would eventually prove he did it."

Report of Dr. Gudjonsson, Record, Vol. 16, Tab A,1, p. 24

457. Dr. Gudjonsson reviewed the moment of the interaction between Huneault and Phillion when Phillion first claimed to have committed the murder:

"On the basis of the police evidence, the confession Mr. Phillion gave to the police on 11 January 1972 was triggered by Detectives Nadori and Huneault asking Mr. Phillion if he wanted to talk about any other offenses, following the questioning over an attempted armed robbery of a taxi driver, which Mr. Phillion had already admitted to. After initially denying to Detective Nadori that there was anything else to talk about, when the question was later repeated just prior to entering the cell by Detective Huneault, Mr. Phillion wanted to know what Mr. Miller had told the police. He particularly wanted to know if Mr. Miller had told him about "anything big." When told this was the case, he said he would confess to the murder, but before doing so he wanted a cup of coffee. Assuming this interaction is accurately reported, it suggests the following.

Firstly, Mr. Phillion's knowledge that the police had questioned Mr. Miller was clearly an important factor in the confession process. Mr. Miller was not in police custody at the time Mr. Phillion was arrested earlier that day on suspicion of an attempted armed robbery, but it may be that Mr. Phillion believed that he was in police custody. Whether Mr. Miller was

in police custody or not, is less important than what Mr. Phillion believed the situation to be at the time. I have seen no evidence that clearly documents that Mr. Phillion knew that Mr. Miller was not in custody; he clearly knew at the time that Mr. Miller had been questioned by the police and was interested in knowing what he had told the police. If he mistakenly believed that Mr. Miller was in custody, this might have influenced his perceptions of the situation at the time (i.e. that Mr. Miller was more involved in the investigation than he would otherwise have believed and provided a possible inducement to confess).

Secondly, the reference of Mr. Phillion to “anything big” raises concerns about his sense of self-importance at the time. After all he had been investigated before about the murder and released. He may well have claimed an involvement in the murder as a way of looking important in the eyes of the police and Mr. Miller. This is consistent with the explanation that he gave to the two doctors (Dr. Blair and Dr. Arboleda) shortly after his arrest in January 1972. In view of Mr. Phillion’s personality problems and psychopathology, it may represent the single best explanation for the confession, if he truly made a false confession. It directly links his low self-esteem, attention seeking behaviour, need for notoriety to enhance his self-esteem, and impulsivity, to his bragging about a notorious murder. A similar process was seen in the case of Peter Fell, who voluntarily implicated himself falsely in two murders carried out in Aldershot, England, in May 1982 (see Gudjonsson, 2003, for a detailed discussion of the case).

Thirdly, Mr. Phillion requesting a cup of coffee before giving a confession statement to the police is interesting. It suggests that he did not break down and had the need to give the confession statement immediately after he claimed he had committed the murder. This would have been a natural reaction. Instead, he was apparently in full control of the situation, and negotiated a cup of coffee prior to giving the police any details about the murder. This seems quite deliberate and calculated conduct on Mr. Phillion’s part.”

Report of Dr. Gudjonsson, Record, Vol. 16, Tab A,1, pp. 26-27

458. Dr. Gudjonsson reviewed Phillion’s confessions in the context of the three factors listed by Leo and Ofshe (*supra* paragraph 404). He notes that Phillion provided no information that was not already in the public domain. He considered the two trips to the crime scene, and the “improvement” in Phillion’s memory during the second trip. He continued:

“The confession made by Mr. Phillion does not meet any of the three criteria provided by Leo and Ofshe (1998) for demonstrating unique special knowledge.”

and then observed that Phillion gave “some highly inaccurate salient details about the murder”.

Report of Dr. Gudjonsson, Record, Vol. 16, Tab A,1, p. 29

459. Dr. Gudjonsson found Phillion's retractions to be significant (*supra*, paragraph 430). Dr. Gudjonsson rejected Phillion's claims that he had been pressured by the police to confess as not being credible.

"If one accepts that Mr. Phillion was not directly pressured by the police to confess to the murder of Mr. Roy, and that it was a fully voluntary false confession, then the most likely motives to apply from the above list are 1 (seeking attention and notoriety - this would be the most likely explanation, but it may not have been the only explanation), 4 (protecting Mr. Miller from being detained by police, even though he clearly had nothing to do with the murder of Mr. Roy - I do not think this motive can be ruled out as a possibility due to the nature of the relationship between the two men), and 5 (taking revenge on the police, which may have been combined with his love of attention and notoriety)."

Report of Dr. Gudjonsson, Record, Vol. 16, Tab A,1, p. 32

D. Dr. Gudjonsson's conclusions

460. Dr. Gudjonsson is of the opinion that Phillion is the type of person to confess to something he did not do:

"The current assessment shows abnormally high scores on tests of suggestibility, acquiescence and compliance. These are likely to be of long standing (e.g. see Mr. Phillion sister's rating of his compliance). These factors, combined with Mr. Phillion's personality profile, including his major and long standing self-esteem problems, would make him vulnerable to give a false confession irrespective of the type, depending on the circumstances."

As regards why he actually confessed when he did, Dr. Gudjonsson writes:

"It is impossible to know for certain why Mr. Phillion confessed to the murder if he had not committed it. It is likely to have been due to a combination of factors, including the following:

1. The emotional build up to his arrest after the robbery of the taxi driver on 6 January 1972.
2. His turbulent emotional and sexual relationship with Mr. Miller. His relationship with Mr. Miller is undoubtedly an important factor in his making a confession to the police, irrespective of whether or not the confession is true.

3. His allegedly seeing Mr. Miller being taken into police custody on the evening of 10 January 1972 (This possibility, and the potential impact of it, should not be underestimated). Mr. Phillion's perceptions and beliefs about Mr. Miller's interactions with the police after Mr. Miller was taken into police custody are potentially very important.
4. Mr. Phillion's mental state, beliefs and subjective experiences after confessing to the robbery.
5. Mr. Phillion's severe emotional and self-esteem problems, pervasive anti-social orientation, impaired rational judgement, dislike of the police, and disregard for the consequences of his actions.

If Mr. Phillion's confession to the police about the murder of Mr. Roy is false, which is probably the case, then the most significant factor is likely to have been his desire and need to enhance his vulnerable self-esteem by becoming somebody important (i.e. both in the eyes of the police and Mr. Miller), while at the same time also possibly taking his revenge out on the police (i.e. sending them on "a wild goose-chase") for intensively searching for him after the attempted robbery of the taxi driver and, perhaps as a result of his general view of the police."

Report of Dr. Gudjonsson, Record, Vol. 16, Tab A,1, pp. 33-34

461. Dr. Gudjonsson's final conclusion is as follows:

"Having carefully considered this case, I am in no doubt that it is unsafe to rely on the confession Mr. Phillion made to the police in 1972 concerning the murder of Mr. Roy and his previous confessions to Mr. Miller. The confessions, without good independent corroboration, are inherently unreliable due to Mr. Phillion's psychological problems and psychopathology at the time. "

Report of Dr. Gudjonsson, Record, Vol. 16, Tab A.1, pp. 34-35

(c) The Safety of the Verdict in Light of Today's Knowledge of the Evidence

462. There was a great deal Phillion's jury did not know. They did not know of Phillion's conversation with Nadori immediately after the typed confession had been completed. They did not know of the two trips to the crime scene, nor of his conversations during those trips. They did not know of the full extent of his conversations during the night with P.C. Couture, his talk over the

telephone with his mother that was overheard by Couture, his conversation with Detective Sgt. Norton the next morning, and his further repudiation of his confession to the cell officers P.C. Aldrich and P.C. Bayne. They did not know of his conversation with McCombie in April, 1971, nor of his statement to Norton and Coburn on March 12, 1972. They knew nothing of the Trenton alibi, the original statements of the Barbes and the Brazeaus, the August 8 traffic ticket, and the stop at Young's Service Station. They had no information about Phillion's discussions with New Liskeard police officers days after the murder, nor of his conversations with Detectives McCombie and Coburn when he was arrested there and transported by them to Ottawa. They knew nothing of the science of false confessions. A few of these items were known to the defence in 1972; most were not.

463. As regards Mr. Phillion's confession to Neil Miller, the jury heard from Mr. Miller that on January 7, 1972

“to the best of my knowledge [Mr. Phillion] told me *once more* about the murder and how it took place and where it took place and all he told me.” (emphasis added)

According to Miller, Phillion told him that the murder took place in an apartment building, that there was money “under a bed”, and that he stabbed a fireman coming up the stairs. The jury had to balance Phillion's confession to Miller against Miller's opinion that Phillion liked to feel “he was a big man” and often admitted to things that he had never done. The jury also had the benefit of the testimony of Dr. Girodo and Dr. Arboleda, both of whom described Phillion as having low self-esteem accompanied by a desire to impress people. Dr. Arboleda, for example, said that he needed:

“boastful behaviour as a means of enhancing perhaps his self image.”

Dr. Arboleda was asked about Phillion's relationship to Miller:

Q. Now, I take it that you are aware of a relationship between Mr. Miller and Mr. Phillion; there was a personal relationship between Mr. Miller and Mr. Phillion?

A. Yes, I know that. Mr. Phillion told me about this relationship with Mr. Miller. It was of a rather intimate nature.

Q. What would Mr. Phillion achieve, if anything, in disclosing to Mr. Miller about the murder?

A. As I said, Mr. Phillion likes others to believe and feel that he is a big person in this respect, in a negative way, and I would say that saying this to Mr. Miller was his way of making him big, big to Mr. Miller's eyes and also a way of keeping Mr. Miller attached to him. As I already mentioned, these types of relationships usually take or adopt an exploitive type of pattern, in which the person tries to exploit his partner or those who have any contact with him, so it may have been ways of getting Mr. Miller afraid of what he might do to people.

The jury, however, heard nothing of the psychology of false confessions, nor false confession expert evidence that Phillion's psychological profile fit that type of person who would falsely confess to a crime.

Evidence of Miller, Vol. 5, 956/35-40

Evidence of Dr. Arboleda, Vol. 6, 1228/35, 1231/40 to 1232/10

464. In light of today's knowledge of the evidence regarding Mr. Phillion, there is every reason to believe that he did not commit the crime. Unbeknownst to the defence, he was near Trenton at the time of the murder. The investigating officer in 1967 was sufficiently confident in his investigation of Mr. Phillion's whereabouts on August 9, 1967 that he was prepared to eliminate Phillion as a suspect, despite having attended the in-person line-up with Mrs. Roy on August 15, 1967, and despite being informed of the belief of the New Liskeard police that Phillion had stabbed Mr. Roy. Proof of McCombie's belief is reinforced by an examination of his actions thereafter wherein he investigated numerous possible suspects other than Phillion who came to his attention,

and the absence of any reference to Phillion in police reports after April 12, 1968 until March 25, 1971 when Phillion sought out McCombie. In his report of that meeting, McCombie, for unknown reasons, abruptly changed his opinion and wrote that he believed Phillion had committed the murder.

Investigation Report of McCombie, Apr. 2/71, Record, Vol. 2, Tab 88

465. It is submitted that Dr. Gudjonsson's conclusion is correct. The facts as they are now known establish that Phillion did not commit the crime. Common sense dictates that his confessions are false.

PART 8

WHAT DID THE CROWN KNOW?

466. The breadth of the undisclosed material demands an examination of what Mac Lindsay, the Crown who prosecuted Mr. Phillion, knew. He can be presumed to have had a complete copy of the Crown brief. Thus, he would have known the contents of, for example, the wills of P.C. Liboiron and Paul Loyer.

467. There is also clear and convincing evidence that Mr. Lindsay knew the contents of the police investigation reports which have been found in the Archives of Ontario. Volume 9 of the Record herein is entitled:

“April 12, 1968 Investigation Report with Handwritten Notations and Underlining by Crown Attorney Mr. Lindsay and Other Documents Similarly Marked by Him”

By examining Mr. Lindsay’s handwriting on documents handwritten by him that are in the archives (Tab 2), police investigation reports on which his handwriting appears can be isolated. It can be stated with satisfaction that he had reviewed the reports on which his handwriting appears. A sample of the police investigation reports is provided on which Mr. Lindsay’s handwriting appears (Tab 3). Normally he wrote in blue ink; sometimes in red (or grey) pencil. The sample includes McCombie’s first April 12, 1968 report (*infra*). Once the reports on which Mr. Lindsay wrote are identified, they can be further analyzed for other markings on them. In this way, handwritten markings in red and blue that consistently appear on reports on which Mr. Lindsay handwrote can be characterized as his trademarks. Using this analysis, reports can be identified as having been reviewed by Mr. Lindsay even though they have only red pencil or blue pen handwritten markings

on them but no actual handwritten words. As well, many of the police investigation reports have tick marks or “X”s handwritten in red pencil at the top. These markings are consistent with having been made by Mr. Lindsay — the tick marks likely reflected that material in the report was relevant to his task as a prosecutor, the “X”s likely reflected an absence of relevance in the report’s contents to his task, or that the report was a duplicate of one he had already reviewed. In this last regard, there are three “versions” of McCombie’s April 12, 1968 8:00 p.m. report in the archives. The first has red tick marks at the top of both pages. The second only has “duplicate” handwritten at the top of the first page. The third has an “X” in red pencil marked at the top of both pages.

Notes of Mr. Lindsay, Record, Vol. 9, Tab 2

468. As has been noted, one version of Detective McCombie’s April 12, 1968 8:00 p.m. two page report that is in the Archives of Ontario has the word “duplicate” handwritten in blue at the top of the first page.

The handwritten word “duplicate” is consistent with the known handwriting of Mr. Lindsay. Another version of the same report that was in the Archives of Ontario does not have any of Mr. Lindsay’s handwriting on it. However, it does have several markings on it. These include:

- wavy lines in red pencil in the margin on the first page,
- thick underlining in red pencil and blue ink of some sections of both pages of the report,
- two question marks in red pencil in the margin of the second page of the report.

These markings bear Mr. Lindsay’s trademark because:

- his habit of using red pencil or blue ink to draw wavy lines as a means of emphasis appears in his handwritten documents (Tab 2), and in the police investigation reports on which his handwriting appears,
- similarly, his use of thick underlining in red pencil or blue ink of sections of each report appears throughout the investigation reports, and also on the documents that he wrote,
- the question marks in red pencil in the margin area are indicative of Mr. Lindsay; for example, identical question marks appear in the investigation reports of August 13 and August 10, 1967, in red pencil and blue ink respectively, on both of which his handwriting appears.

As regards McCombie’s second April 12, 1968 investigation report, written at 9:00 p.m., it also has a question mark in red pencil in the left margin of the first page, one of Mr. Lindsay’s trademarks, as well as underlining in red pencil.

Investigation Report of McCombie, Apr. 12/68 (8:00 p.m.), Record, Vol. 9, Tab 1, A
 Investigation Report of McCombie, Apr. 12/68 (8:00 p.m.), Record, Vol. 9, Tab 1, B
 Investigation Report of McCombie, Apr. 12/68 (9:00 p.m.), Record, Vol. 9, Tab 1, D

469. It is important to note the location of the question marks on McCombie’s two reports for April 12, 1968. On the 8:00 p.m. report, two question marks appear on the second page. The first appears as follows:

It is of note that the underlining in red pencil, another of Mr. Lindsay's characteristics, includes underlining of the words

“... that we do not believe that Romeo is responsible for this murder.”

The second question mark on the report appears as follows:

The question mark in the margin, and the underlining are clearly focused on the words

“... but it is felt by the writer and Lieut. Welsh that Phillion is not the man we are looking for ...”

In the case of the 9:00 p.m. report, the question mark in the margin appears as follows:

The significance of the locations of the question marks on the two April 12 reports, and the underlinings, do not require further elaboration.

Investigation Report of McCombie, Apr. 12/68 (8:00 p.m.), Record, Vol. 9, Tab 1, B
Investigation Report of McCombie, Apr. 12/68 (9:00 p.m.), Record, Vol. 9, Tab 1, C

470. Reference should also be made to two other reports. On September 8, 1967, McCombie prepared an investigation report regarding developments in the case. A handwritten tick mark appears in red pencil at the top of the report. A handwritten question mark appears in the margin of the report as follows:

Inspector Soucie prepared a three page investigation report on March 4, 1968 which he signed off as "A. Soucie for Det. McCombie." A handwritten "X" in red pencil appears at the top of all three pages of the report. A marking in red pencil identifiable as that of Mr. Lindsay appears as follows:

Once again, the significance of the markings on these documents speak for themselves.

Investigation Report of McCombie, dated September 8, 1967, Record, Vol. 9, Tab 1, D
Investigation Report of Soucie, dated March 4, 1968, Record, Vol. 9, Tab 1, E

471. Mr. Lindsay's handwriting and/or trademarks appear on all the 1972 investigation reports of Huneault and Nadori which make frequent references to the April 12, 1968 report, the significance of the Trenton Service Station, Mr. Phillion receiving a traffic ticket on August 8, his stop at Young's Service Station on the same day, and the problems presented by the original statements of the Barbes and Gail Brazeau. For example, Mr. Lindsay's markings appear on Detective Nadori's report of January 13, 1972, and on Detective Huneault's reports of January 13 and 23, 1972, both of which made it clear that the police were worried by the Trenton alibi and other facets of their case. *In fact, every police investigation report of significance that we have*

recovered and filed with this application has a version in the archives with Mr. Lindsay's handwriting and/or markings on it. Finally, in his handwritten list of “Re Trial Additional witnesses”, Mr. Lindsay included “Service station operators near Trenton”. This is a telling entry. It suggests that Mr. Lindsay was anticipating a possible Trenton alibi defence at trial, and wanted to be ready to respond with the service station operators contacted in the Trenton area by Huneault and Nadori in 1972, none of whom would support Phillion’s alibi.

“Re Trial Additional Witnesses” Record, Vol. 12, Tab 4
 Investigation Report of Huneault, Jan. 13/72, Record, Vol. 9, Tab 3,I
 Investigation Report of Nadori, Jan. 13/72, Record, Vol. 9, Tab 3,J
 Investigation Report of Huneault, Jan. 23/72, Record, Vol. 9, Tab 3,L

472. On October 3, 2001, we wrote to Mr. Lindsay¹⁴⁵ and enclosed a copy of the 8:00 p.m. April 12, 1968 police investigation report. The letter included the following:

“We have met with Mr. Phillion’s trial counsel, Arthur Cogan. He did not raise the Trenton alibi at Mr. Phillion’s trial. He has advised us that he had no knowledge of the April 12, 1968 police report and was unaware of it until we showed it to him. This is not surprising. Mr. Cogan was and is, to our knowledge, a well respected member of the bar and it is impossible to believe that he could have failed to appreciate this report’s significance if he had known of its contents. As well, Mr. Cogan obviously defended Mr. Phillion to the best of his ability; one only has to consider that he had his client polygraphed and then unsuccessfully sought to have the polygraph admitted into evidence at the trial.

If you have never seen the report, you may recall that by Detective McCombie had, by the time of Mr. Phillion’s arrest in 1972, lost the investigative file. This may account for your

¹⁴⁵ At the time we wrote to Mr. Lindsay, Howard Leibovich of the Crown Law Office had advised that he had forwarded all the archival material that could be found and, in particular, that the trial Crown brief could not be found (see letters from Mr. Leibovich dated December 24, 1999, March 6, 2000, August 2, 2000 and September 5, 2000). Subsequently, in 2002, we contacted the Archives of Ontario directly and discovered a large number of additional documents which included more police reports, a copy of the Crown brief, documents handwritten by the Crown, and other documents.

ignorance of the report.

Could you please try to recall back 30 years into your memory and let me know if you ever saw the report? I appreciate this is a tall order but Mr. Phillion is still serving a life sentence and refuses to seek parole unless and until his innocence is established.

Would you please call me so that we can discuss this matter? I look forward to hearing from you.”

On October 31, 2001, James Lockyer followed up on the letter by telephoning Mr. Lindsay. He asked Mr. Lindsay whether he had seen the April 12, 1968 report. Mr. Lindsay replied:

“I can’t recall ever seeing the report.”¹⁴⁶

Since then, we have been advised that Mr. Lindsay has written to Mr. James Stewart of the Crown Law Office to explain his position. Mr. Stewart has been requested to release this document to us.

Letter from J. Lockyer to M. Lindsay, Oct. 3/01, Record, Vol. 3, Tab A,38
Letter from J. Lockyer to J. Stewart, Feb, 24/03, Record, Vol. 15, Tab 1

473. On any reasonable interpretation of the evidence, Mr. Lindsay was intimately familiar with all aspects of the prosecution of Mr. Phillion. He became involved in the case at least by January 12, 1972, within one day of Mr. Phillion’s confession. He conducted the preliminary hearing and the trial. The question that needs to be answered is why he did not disclose materials of obvious relevance to the defence.

¹⁴⁶ Professor Martin also spoke by telephone to Mr. Lindsay in November, 2001. Mr. Lindsay took the position that he had decided not to discuss Mr. Phillion’s case any further with Mr. Phillion’s representatives.

474. In 1972, an almost complete trust and confidence was placed in the ability of Crowns to exercise their discretion “in the interests of justice” in deciding what needed to be disclosed to the defence. Traditionally, Crowns felt it was within their power to determine whether evidence was “reliable”, and would only disclose material that they considered to be such. Mr. Lindsay gave a hint of this attitude during some of his submissions at the preliminary hearing, especially when he told the Court that he might reveal at a future date what was behind Detective Norton’s questioning of Mr. Phillion about selling a car radio in Trenton. He said:

“... it has to be something that the court has confidence in the Crown to produce as to whether it will assist the court. But in my opinion, I do not wish to tender the statement that Mr. Cogan is examining Detective Sergeant Norton about and I have reasons for it which we may disclose at a later time after the preliminary inquiry is over. But in my experience at this stage, I do not wish to tender that statement for certain reasons. (emphasis added)”

The Courts of that era paid extraordinary deference to the Crown’s discretion in making disclosure.

In *Stinchcombe*, Sopinka J. noted as follows:

“The tradition of Crown Counsel in this country in carrying out their role as “ministers of justice” and not as adversaries has generally been very high.”

Whether true or not, this statement says much about the practices and views of the day.

Submissions of Crown, Preliminary Hearing, Vol. 7, 23/40-55
R. v. Stinchcombe (1991), 68 C.C.C. (3d) 1 (S.C.C.) at 12

475. In this regard, Guy Paul Morin’s first trial in 1985, held before *Stinchcombe*, for the murder of Christine Jessop is instructive. Whether Mr. Morin had an alibi for the time of Christine’s disappearance was in large part dependent on whether her parents and brother returned home earlier or later in the afternoon to find her missing. In his Report, Commissioner Kaufman explained what

happened regarding disclosure of an original statement of Christine's brother at the first trial::

“John Scott was provided with a 3-page legal-size document entitled “Evidence of Kenneth Jessop”, prepared by Detective Fitzpatrick prior to the first trial, which became part of his Crown brief. The document contained very detailed evidence relating to the timing of Ken and Janet Jessop's whereabouts on October 3, 1984. This document was not provided to defence counsel; instead, John Scott revised the will-say of Ken Jessop's anticipated evidence and provided the defence with a one-page edited version. In the revision, he deleted the following portions of the evidence of Ken Jessop:”

(the Commissioner then listed a number of items in Ken Jessop and Janet Jessop's statements that had been deleted by Mr. Scott from the versions disclosed to the defence that were relevant to the timing issues)

*“When asked about the deleted references to timing during the Inquiry, Mr. Scott said that the material was removed because “it was unreliable”. In his view, Ken Jessop's statements in this regard were not accurate. He had met Ken Jessop once or twice and had spoken to him about issues in order to determine whether to call him to give evidence at the first trial. He decided not to call him and was concerned that the times put forward by Ken Jessop were in conflict with one another. Mr. Scott does not believe that he reviewed other notes or statements documenting the Jessop timing before vetting the will-say, but maintained that he was aware of them from the information of the investigating officers. In retrospect, Mr. Scott told the Inquiry that it would have been better to have allowed the defence to view this evidence to enable them to come to their own opinion as to the reliability of Ken Jessop. He agreed with counsel's suggestion that he probably should have indicated, at least in brackets, times mentioned by Ken Jessop. He stated that in the post-*Stinchcombe* environment all material would have been disclosed; however, at the time of making these decisions, he believed that Ken Jessop was simply in error and therefore vetted the will-say accordingly.*

.....

As Mr. Scott admitted, it would have been better had he not vetted the will-says in the way he did. Certainly, the defence was entitled to know that different times were given on different occasions by Ken and Janet Jessop, and they could then have dealt with it in whatever manner they saw fit. That, however, is not only today's wisdom, but today's law. In 1985, the Crown was obligated, as it is now, to disclose exculpatory evidence. However, I understand Mr. Scott's interpretation of his obligation at the time and, whereas it constituted an error of judgment, I accept his explanation and find no deliberate attempt to circumvent his obligations. I should say that, in so finding, I am mindful of the fact that Mr. Scott did not press Ms. Jessop to confirm the 4:30 to 4:35 arrival time (when he led her evidence at the second trial) and elicited from her that she had earlier told the police 4:10 p.m. I appreciate that Mr. Ruby's approach to the timing issue might have been different had he been aware of the full extent of the Jessops' prior statements, but Mr. Scott's approach at the first trial is relevant to the absence of any *mala fides*.”

476. It may be that the same sentiments apply to Mr. Lindsay's conduct in not disclosing relevant material to Mr. Phillion's defence. He may have been so convinced by Mr. Phillion's confession that he felt that anything which suggested it was false could not be reliable, and hence did not have to be disclosed. This position would be, to say the least, a difficult one to sustain in the light of the information that Mr. Lindsay had before him. It should have been made more difficult as soon as he realized the nature of Mr. Phillion's defence. It should have been made even more difficult once he realized how the evidence of the Barbes and the Brazeaus as to when they last saw Mr. Phillion materially changed from the Tuesday to the Wednesday night. Perhaps he never applied his mind to the combination of information in the various reports so as to appreciate their full significance.

477. Mr. Cogan had a few pieces of information at the preliminary hearing, and on the *voir dire* at trial, that could have alerted him to the existence of some of the undisclosed material. These came up in the evidence of Detectives McCombie and Huneault at the preliminary hearing, and Detective Norton at the preliminary hearing and trial. It can be said with confidence that Mr. Cogan provide a spirited and conscientious defence of his client so fault cannot be ascribed to him for not finding out more. Several matters likely contributed to the circumstance.

- (1) In 1972, defence counsel generally placed considerable faith in the way disclosure was provided. They accepted that Crowns viewed their role as being ministers of justice, and that it excluded any notion of winning or losing. As a consequence, the defence often accepted on faith that the Crown always disclosed all relevant evidence.

- (2) At that time, defence counsel had every reason to believe that a Court would, rarely, if ever, intervene with the Crown's exercise of his discretion in deciding what evidence should be disclosed. Consequently, any application to a trial judge for further disclosure was doomed to fail.
- (3) Mr. Lindsay's reputation was, as far as can be determined, one that would not cause concern for the defence. Mr. Cogan could reasonably conclude that Mr. Lindsay would conscientiously disclose all relevant materials to him.
- (4) Mr. Cogan had a difficult client in Mr. Phillion; a man whose ability to recount past events accurately was very poor. He could not, therefore, rely on his client for information that might have caused him to make further inquiries of the Crown regarding matters for which he only had hints that there may be relevant undisclosed materials.

See *Boucher v. The Queen* (1954), 110 C.C.C. 263 (S.C.C.) at 270

PART 9**THE REMEDY SOUGHT BY MR. PHILLION*****INTRODUCTION***

478. This is an application by Romeo Phillion for ministerial review on the grounds that he has been the victim of a miscarriage of justice. Pursuant to section 696.3(3) of the *Criminal Code*, the Minister of Justice, if satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred, has the power

(c) to quash Mr. Phillion's conviction and direct that he have a new trial in the Superior Court of Justice; or

(b) to refer his case to the Ontario Court of Appeal for hearing and determination by that Court as if it were an appeal of his conviction.

Sections 696.1 and 696.3 of the *Criminal Code*

479. It can be argued that section 696.1 and its accompanying sections violate the *Charter of Rights and Freedoms* and hence are unconstitutional. Nevertheless, Mr. Phillion has elected to seek a remedy through the section 696.1 process for the miscarriage of justice that he continues to experience. After being imprisoned for more than thirty-one years, he wants his case to be resolved as quickly as possible.

480. In an application filed under the predecessor section 690 by the *Association in Defence of the Wrongly Convicted* in the *Steven Truscott Case*, concern was expressed that the acknowledgment of a wrongful conviction may be seen by the Minister to undermine the justice system. In fact, the previous Minister, the Honourable Anne McLellan in an October 26, 1998 news release which accompanied the release of a consultation paper entitled “Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code” said:

“Regrettably, wrongful convictions sometimes can and do occur *and, when they do, the entire justice system is called into question.*” (emphasis added)

A tribunal independent of the Minister and the Department of Justice would not have to consider the broader political implications of its decision. The concern is acute in Mr. Phillion’s case. There has been no case to date in Canada, the United States or United Kingdom in which a wrongful conviction has resulted in a person serving more than 31 years in prison.

481. The exposure of a wrongful conviction does not necessarily call the entire justice system into question. However, we do believe that the *failure to expose* a wrongful conviction brings the entire justice system into question.

482. Ironically, the advent of post-conviction DNA testing has been used by some to create a new threshold of proof for the wrongly convicted; namely the notion that a convicted person should not be exonerated unless he/she can prove innocence absolutely either through exculpatory DNA testing or by establishing the identity of the real culprit. Thus, David Milgaard and Guy Paul Morin were officially exonerated as a result of post-conviction DNA testing, and Donald Marshall was officially

exonerated when it was proved that Roy Ebsary was the real killer. In Romeo Phillion's case, the only bodily samples collected from the scene of the homicide, unknown hairs, that might identify Mr. Roy's killer were lost by the authorities by the time of his arrest.¹⁴⁷ This is regrettable. Today, they could have been DNA typed by means of mitochondrial testing. After 31 years, Mr. Phillion cannot produce Mr. Roy's real killer. This should not deny him the right to exoneration. Post-conviction DNA exonerations in Canada and elsewhere should not "raise the bar" in wrongful conviction cases. There is no reason why a conviction which can be reviewed through post-conviction DNA testing should be any more or less suspect than a conviction in which post-conviction DNA testing has become impossible. DNA testing may not be able to play a role because bodily samples were not left at the scene by the killer, or, as in this case, relevant exhibits may have since been destroyed. But the absence of relevant evidence for DNA testing, or newly discovered proof of the identity of the real culprit, should not foreclose an exoneration in a wrongful conviction case. In fact, the post conviction DNA cases should alert us to the realization that wrongful convictions are more frequent than we like to admit *in all types of cases*.

(a) The Principles to be Applied to a Post-Conviction
Application to the Executive

483. In the *Milgaard Reference*, the Supreme Court of Canada set out the circumstances in which a conviction must be quashed, and an appropriate remedy granted, after a referral by the Executive.

¹⁴⁷ The police investigators in 1972 looked for the missing hairs. On January 12, they asked Dr. Tolnai, the pathologist, if he knew where the hair was that had been seized from Mr. Roy's fingernail. Dr. Tolnai thought it was in the custody of the police. In his January 13, 1972 report, Huneault listed as a task to do: "Attempt to locate the hair exhibit recovered from the deceased person's fingernails, preceding the autopsy." Investigation report of Huneault, Jan. 13/72, Record, Vol. 2, Tab 98

They are as follows:

- if the Court is satisfied beyond a reasonable doubt that the Applicant is innocent, the Governor in Council should be advised to exercise his power to grant a free pardon,
- if the Court is satisfied on the preponderance of the evidence that the Applicant is innocent, the Court should be requested to re-open the case, quash the conviction and enter an acquittal,
- if the Court is satisfied that new evidence before the Court is reasonably capable of belief and, taken together with the evidence adduced at trial, could reasonably be expected to have affected the verdict, the Minister of Justice should be advised to quash the conviction and direct a new trial.

The Minister's powers, therefore, must be exercised according to these parameters.

Reference Re: Milgaard (Can.) (1992), 71 C.C.C. (3d) 260 (S.C.C.)

484. In 1994, two years after the *Milgaard* decision, in *Thatcher*, the then Minister of Justice, the Honourable Allan Rock, set out his views of the manner in which the Minister's powers should be exercised. He suggested that applications:

“... should ordinarily be based on new matters of significance that either were not considered by the courts or that occurred or arose after the conventional avenues of appeal had been exhausted.”

He then continued:

“Where the applicant is able to identify such ‘new matters’, the Minister will assess them to determine their reliability. For example, where fresh evidence is proffered, it will be examined to see whether it is reasonably capable of belief, having regard to all of the circumstances. Such ‘new matters’ will also be examined to determine whether they are relevant to the issue of guilt. The Minister will also have to determine the overall effect of the ‘new matters’ when they are taken together with the evidence adduced at trial. In this regard, one of the important questions will be ‘is there new evidence relevant to the issue of guilt which is reasonably capable of belief and which, taken together with the evidence adduced at trial, could reasonably be expected to have affected the verdict?’”.

He concluded by saying:

“Finally, an applicant under section 690, in order to succeed, need not convince the Minister of innocence or prove conclusively that a miscarriage of justice has actually occurred. Rather, the applicant will be expected to demonstrate, based on the analysis set forth above, that there is a basis to conclude that a miscarriage of justice likely occurred.”

The Colin Thatcher Section 690 Application: Reasons for Minister’s Decision; April 14/94

485. The new provisions of section 696.1 adopt this language insofar as they require the Minister “to be satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred”. This test should, however, be interpreted to provide a lesser threshold than that laid down by the Supreme Court of Canada in *Milgaard*. To suggest otherwise would lead to the absurd result that the test in the Court of Appeal after a Reference has been made by the Minister is less demanding than, or as demanding as, the test applied by the Minister in deciding whether to refer the case in the first place. The wording of section 13(1) of the *Criminal Appeal Act* (U.K.), 1995, which provides that the *Criminal Cases Review Commission* should not refer a conviction to the Court of Appeal:

“...unless (a) the Commission considers there is a real possibility that the conviction ... would not be upheld were the reference to be made.”

is a reasonable equivalent for the test laid down in section 696.1 that should be applied by the Minister.¹⁴⁸ In Mr. Phillion’s case, however, his case meets the criteria of section 696.1 regardless of the nature of the test to be applied.

¹⁴⁸ In *Dixon*, Cory J. used the phrase a “reasonable possibility”. See paragraph 487 *infra*.

(b) Applying the Principles to Mr. Phillion's Case

486. If this were a conventional appeal, it would be viewed as an appeal based on fresh evidence.

In the context of *Thatcher*, it is an application

“based on new matters of significance that ... were not considered by the courts [and] arose after the conventional avenues of appeal had been exhausted.”

The “new matters” have arisen only now because the prosecution failed to disclose the contents of the police investigation to the defence which, in turn, prevented Mr. Phillion from making full answer and defence at his trial. In *Dixon*, the Supreme Court of Canada addressed the following issues:

- “(1) the appropriate test to be used to determine whether the Crown's *inadvertent* failure to disclose relevant material constituted a violation of the appellant's right to disclosure under s. 7 of the *Canadian Charter of Rights and Freedoms*?
- (2) Where an appellant's right to disclosure is violated, what is the appropriate test to be used to determine whether his or her *Charter* right to make full answer and defence was also thereby impaired?
- (3) In determining whether an appellant's right to make full answer and defence was impaired, what effect is to be given to defence counsel's lack of due diligence?”
(Emphasis added) per Cory J.

Cory J's reference to the test to be used in a case in which the failure to disclose was inadvertent requires comment in the context of Mr. Phillion's case. The non-disclosure in his case was obviously not “inadvertent”. Mr. Lindsay was aware of the information, and any decision not to disclose must have been by choice rather than omission. Presumably, he did not disclose relevant material to Mr. Phillion's defence because he believed, correctly, that the law at that time did not require him to provide disclosure unless he perceived that it was in the interests of justice to do so,

and he decided that it was not. Detective Huneault, who was present as the investigating officer throughout the trial, must have acquiesced in Mr. Lindsay's decisions. The interests of justice were undoubtedly viewed differently then than they would be today. Nevertheless, the Crown's conduct must be questioned for not disclosing, at a minimum, some of the undisclosed materials in their possession even by the dreadful standards of 1972. There is also some circumstantial evidence that the police may have been apprehensive of the potential consequences if it were to come to be known that relevant materials had not been disclosed to the defence. This is because it can be reasonably inferred that, on the one hand, in his testimony Detective McCombie sought to distance himself in his testimony from knowledge of the 1972 investigation and, on the other hand, in his testimony Detective Nadori sought to distance himself from knowledge of the 1967 investigation. Yet even if Mr. Phillion's case is treated *as if the non-disclosure was, in his case, inadvertent*, he meets the *Dixon* tests. Due diligence on the part of the defence does not arise in Mr. Phillion's case because of the state of the law regarding disclosure in 1972. Mr. Cogan cannot be criticized for a lack of due diligence for his failure to request disclosure of the fruits of the police investigation of the homicide because he knew the Court would not order it but would simply leave disclosure to the discretion of the Crown.

R. v. Dixon (1998), 122 C.C.C. (3d) 1 (S.C.C.)
Evidence of Nadori, Preliminary Hearing, Vol. 6 595/30-40
See paragraph 214 *supra*

487. Cory J. in *Dixon*, in reviewing the appropriate test in a case of *inadvertent* non-disclosure, first explained that the Crown's duty to disclose is triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence. He said:

“Thus, where an accused demonstrates a *reasonable possibility* that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence, he has also established the impairment of his *Charter* right to disclose.” (emphasis not added)

Romeo Phillion has surely met this test. The undisclosed information presented in this application could have been used by the defence to meet the case advanced by the Crown, could have been used to advance an alibi on his behalf and could have been used in making any number of fundamental decisions vital to the conduct of his defence.

R. v. Dixon (supra) at p. 12.

488. In *Dixon*, Cory J. went on to analyze the circumstances in which the violation of an accused’s right to disclosure will lead to a remedy on appeal. He held that the accused bears the burden of demonstrating on the balance of probabilities that the right to make full answer and defence was impaired as a result of the non-disclosure. He continued:

“This burden is discharged where an accused demonstrates that there is a *reasonable possibility* the non-disclosure affected the outcome at trial or the overall fairness of the trial process. ... Imposing a test based on a reasonable possibility strikes a fair balance between an accused’s interest in a fair trial and the public’s interest in the efficient administration of justice. It recognizes the difficulty of reconstructing accurately the trial process, and avoids the undesirable effect of undermining the Crown’s disclosure obligations. This would be the result if the Crown were placed in a better position by withholding rather than disclosing information of relatively low probative value. However, the reasonable possibility to be shown under this test must not be entirely speculative. It must be based on *reasonable* possible uses of the non-disclosed evidence or *reasonably* possible avenues of investigation that were closed to the accused as a result of the non-disclosure. If this possibility is shown to exist, then the right to make full answer and defence was impaired.” (emphasis not added)

R. v. Dixon (supra) at pp. 16-17.

489. Cory J. pointed out that the type of analysis advanced in this brief has to be undertaken in a case of non-disclosure. He said:

“Thus, in order to determine whether the right to make full answer and defence was impaired, it is necessary to undertake a two-step analysis based on these considerations. First, in order to assess the reliability of the result, the undisclosed information must be examined to determine the impact it might have had on the decision to convict. Obviously this will be an easier task if the accused was tried before a judge alone, and reasons were given for the conviction. If at the first stage an appellate court is persuaded that there is a reasonable possibility that, *on its face*, the undisclosed information affects the reliability of the conviction, a new trial should be ordered. Even if the undisclosed information does not *itself* affect the reliability of the result at trial, the effect of the non-disclosure on the overall fairness of the trial process must be considered at the second stage of analysis. This will be done by assessing, on the basis of a reasonable possibility, the lines of inquiry with witnesses or the opportunities to garner additional evidence that could have been available to the defence if the relevant information had been disclosed. In short, the reasonable possibility that the undisclosed information impaired the right to make full answer and defence relates not only to the content of the information itself, but to the *realistic* opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence.”

The task in this case is more difficult because Mr. Phillion was tried by a jury rather than a judge without a jury. However, his case meets both tests laid down by Cory J. There is, it is submitted, a “reasonable possibility” that, on its face, the undisclosed information affects the reliability of his conviction. Indeed, it is submitted that this has been proven to an absolute certainty. There is ample evidence of realistic opportunities for Mr. Phillion’s defence to have explored possible uses of the undisclosed information for purposes of investigation, gathering evidence and putting forward a genuine alibi at his trial.

R. v. Dixon (supra) at pp. 17-18

(c) The Submission that Mr. Phillion is Innocent of Mr. Roy’s Murder

490. An assessment of the proper remedy in this case requires the Minister to decide which of the *Milgaard* plateaus this application reaches. We submit that Mr. Phillion is innocent and we submit that the Minister should be equally convinced that he is innocent.

491. The only rational conclusion that can be drawn on all the evidence now available is that Mr. Phillion left Ottawa on Tuesday night, or early Wednesday morning, after talking to Mr. Barbe. His car broke down on Highway 401 near Trenton, and was towed to a service station. He gave the service station his car radio as payment. He then continued his journey to Toronto, in the hope of seeing his brother, and then on to New Liskeard. His confessions to the police and Neil Miller were the actions of an immature and inadequate man for which he has paid an extraordinary price. His repudiations of his confession to his custodians, along with his personality, provide the hallmarks of a false confession. The contents of his confession which contained accurate information that was already in the public domain, but was littered with “*mundane inaccuracies*”, provide more evidence that his confession was false.

492. Mr. Phillion’s claims since his conviction have been strikingly consistent in one regard: his claim of innocence. The details of his claim have changed; this is a reflection of his confused thinking and memory which likely prejudiced his ability to fully instruct counsel on the facts and defend himself at his trial. But his insistence on his innocence has never wavered. His actions have reinforced his claim; these include his refusal to seek parole. On January 11, 2002, in explaining to the Parole Board his refusal to seek parole, he said:

“Parole is for the guilty, not the innocent.”

On November 9, 2001, the *Globe & Mail* said in an editorial:

“Mr. Phillion, meanwhile, remains in prison because he refuses to apply for parole. Remorse – a willingness to acknowledge guilt – is a bedrock tenet of the parole system, and Mr. Phillion will have none of it, because he insists he is innocent. David Milgaard’s infamous penitentiary sentence ran a full 23 years for much the same reason.”

Editorial, Globe & Mail, Record, Vol. 7, Tab 55

493. The record as it now stands proves Mr. Phillion's innocence. Of course, it is unrealistic to suppose that he can be re-tried for Mr. Roy's murder in 2003; an attempt to reconstruct the case 36 years later would be impossible. In any event, he has an irrefutable alibi. He should have the pall of suspicion removed from him because, through no fault of his own, he could not properly defend himself in court at his trial in 1972. For these reasons, the Minister is urged to adjudicate this application in a way that will ensure Mr. Phillion's exoneration.

(d) The Remedy that is Urged on the Minister

494. It is submitted that the Minister can, and should, be satisfied *beyond a reasonable doubt* that Romeo Phillion is factually innocent of the murder of Mr. Roy. It is unnecessary for his case to be referred by the Minister to the Ontario Court of Appeal; rather the Minister should quash his conviction and direct a new trial with all possible speed. This was the remedy granted by the Minister in the recent case of *Steven Richard Kaminski*. At Mr. Phillion's new trial, in the Superior Court of Justice, on his arraignment the Attorney General of Ontario can offer no evidence and invite the Presiding Justice to acquit him of Mr. Roy's murder.

Conclusion

495. Romeo Phillion has spent more than 31 years in prison for a crime he did not commit. He

has spent some of the best years of his life in prison. There are many who bear responsibility for this, including the prosecuting Crown at his trial, who did not meet his minimal obligations, the police officers who concealed evidence from the defence, and the judiciary in general because, in those days, they were prepared to place their trust in prosecutors as to what should and should not be disclosed. Mr. Phillion is now 64 years of age. He is a pensioner. He presents no danger to the public. We urge the Minister and his representatives, and the Attorney General of Ontario, to agree that the time has come for Mr. Phillion to be released forthwith, and that the investigation that the Minister must now carry out be conducted while he is free. That is the least that is owed to the man whose imprisonment for a crime he did not commit has broken all records for its length.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED this 15th day of May, 2003.

Dianne L. Martin

Director of the *Innocence Project*

James Lockyer

Counsel for the *Innocence Project*

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