**CITATION: Truscott (Re), 2007 ONCA 575**
**DATE: 20070828**
**DOCKET: C42726**

# COURT OF APPEAL FOR ONTARIO

**MCMURTRY C.J.O., DOHERTY, WEILER, ROSENBERG and MOLDAVER JJ.A.**

**IN THE MATTER OF SECTION 696.3 OF THE *CRIMINAL CODE*, S.C. 2002, C. 13;**

**AND IN THE MATTER OF AN APPLICATION FOR MINISTERIAL REVIEW (MISCARRIAGES OF JUSTICE) SUBMITTED BY STEVEN MURRAY TRUSCOTT IN RESPECT OF HIS CONVICTION AT GODERICH, ONTARIO, ON SEPTEMBER 30, 1959, FOR THE MURDER OF LYNNE HARPER;**

**AND IN THE MATTER OF THE DECISION OF THE MINISTER OF JUSTICE TO REFER THE SAID CONVICTION TO THE COURT OF APPEAL FOR ONTARIO FOR HEARING AND DETERMINATION AS IF IT WERE AN APPEAL BY STEVEN MURRAY TRUSCOTT ON THE ISSUE OF FRESH EVIDENCE, PURSUANT TO SUBSECTION 696.3(3)(a)(ii) OF THE *CRIMINAL CODE*.**

**B E T W E E N:**

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| **HER MAJESTY THE QUEEN** | ) | **James Lockyer, Philip Campbell, Marlys Edwardh, Hersh E. Wolch, Q.C. and Jenny Friedland, for the appellant** |
| **(Respondent)** | ) | |
| **- and -** | ) | |
| **STEVEN MURRAY TRUSCOTT** | ) | **Rosella Cornaviera, Gregory J. Tweney, Alexander Alvaro and Leanne Salel, for the respondent** |
| **(Appellant)** | ) | |

**HEARD: January 31, February 1, 2, 5, 6, 7, 8, 9, 13 and 14, 2007**

**LIST OF APPENDICES**

**BY THE COURT:**

[1] In 1959, fourteen-year-old Steven Truscott was charged with the murder of his twelve-year-old classmate, Lynne Harper. He has maintained his innocence from the outset. A jury convicted Steven Truscott. Every court that has reviewed the verdict has upheld the conviction.

[2] The guilty verdict and the subsequent affirmations of that verdict have not deterred Mr. Truscott in his efforts to demonstrate that he is an innocent man. Fortified by the unqualified support of family members and others, and with the assistance of a group of skilled and indefatigable lawyers, Mr. Truscott returns to the judicial system one last time seeking vindication.

[3] This time Mr. Truscott is successful. Based on evidence that qualifies as fresh evidence in these proceedings, we are satisfied that Mr. Truscott's conviction was a miscarriage of justice and must be quashed. We are further satisfied upon a review of the entirety of the evidentiary record and the additional material available to this court and not previously judicially considered, that if a new trial were possible, an acquittal would clearly be the likely result. The interests of justice dictate that we make that order. Mr. Truscott should stand acquitted of the murder of Lynne Harper.

# PART I – INTRODUCTION

**Overview of the Case**

[4] Between approximately 7:00 and 7:30 p.m. on June 9, 1959, Steven Truscott was seen riding with Lynne Harper on his bicycle. The two were headed north along the well-travelled County Road running between the Royal Canadian Air Force Station near the town of Clinton, Ontario and King's Highway No. 8.[1] Clinton is in southwestern Ontario, about eighty kilometres northwest of London.

[5] Close to midnight that evening, Lynne was reported missing by her father. Two days later, on the afternoon of June 11, a member of a search party found her partially nude body in a wooded area known locally as Lawson's Bush. Lynne's assailant had strangled her with her own blouse, which was found knotted around her neck. She had been sexually assaulted.

[6] Steven Truscott, the appellant in these proceedings, was found guilty of her murder and sentenced to hang. The sentence was later commuted to life imprisonment. His attempts to appeal that conviction failed.

[7] In 1966, the federal Minister of Justice referred the conviction to the Supreme Court of Canada for its consideration. An eight-person majority of that court upheld the conviction. We are now asked by the Minister of Justice ("Minister") to once again

[1] In Appendix 1 to this judgment, we provide a detailed map of the area around the R.C.A.F. Station, including the County Road, Highway No. 8 and the various landmarks referred to in these reasons.

review the appellant's conviction and to consider his case as if it were an appeal on the basis of fresh evidence.

[8] Our analysis proceeds through two stages. In the first stage, we consider the material tendered by the appellant in these proceedings that in our view is admissible as fresh evidence pursuant to s. 683(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. We are satisfied that the interests of justice dictate that we admit evidence that significantly undermines the medical evidence relied on by the Crown to establish that Lynne Harper's time of death was before 8 p.m. on June 9. This fact was a crucial component of the Crown's case. As that finding is not reliable given the new evidence, the conviction cannot stand and must be quashed as a miscarriage of justice.

[9] The appellant advances strong arguments that some of the other material adduced on his behalf is admissible as fresh evidence. However, since the fresh evidence related to the issue of the time of Lynne Harper's death is sufficient to quash the conviction, we are satisfied that the rest of the material being tendered as fresh evidence can be considered at the second stage of our analysis when we consider the appropriate remedy.

[10] At the second stage, we examine the entirety of the trial record, the record that was before the Supreme Court of Canada on the previous Reference in 1966 ("the first Reference" or the "1966 Reference"), the fresh evidence we have received in these proceedings, and a mass of other material, none of which has been previously judicially considered. We examine this material in an effort to assess the likely result were a new

trial to be held. In making this assessment, we recognize, as does the appellant and the Crown, that a new trial is a practical impossibility at this date, so many years removed from the events surrounding the murder.

[11] We are satisfied that were a new trial possible, the acquittal of Mr. Truscott, while not the only possible verdict, would clearly be the more likely result given the entirety of the material presently available. That conclusion causes us to exercise our remedial discretion in favour of ordering an acquittal.

[12] Before we proceed to the two stages of our analysis, we provide a history of the entirety of the proceedings involving the appellant. We also summarize the salient features of the case for the Crown and the defence at trial and at the 1966 Reference. We then briefly review the reasons of the majority of the Supreme Court for upholding the conviction on the first Reference.

**History of the Proceedings Involving the Appellant**

[13] The appellant was taken into police custody on the evening of Friday, June 12, 1959, the day after Lynne Harper's body was discovered. At 2:30 a.m. on Saturday, June 13, he was accused of the murder of Lynne Harper, contrary to s. 206 of the *Criminal Code*, S.C. 1953-54, c. 51, and was therefore charged with being a juvenile delinquent under the provisions of the *Juvenile Delinquents Act*, R.S.C. 1952, c. 160. On June 20, he was ordered to stand trial for the murder of Lynne Harper as an adult under the provisions of the *Criminal Code*. A conviction on the charge of murder at that time

carried with it the death sentence. The order to proceed against the appellant as an adult was affirmed on appeal.

[14] A two-day preliminary inquiry was held on July 13 and 14, 1959 before Magistrate D. E. Holmes. At the end of these proceedings, the appellant was committed to stand trial on a charge of capital murder.

[15] The trial began on September 16, 1959 at the Goderich courthouse before Justice R. I. Ferguson and a jury. The court sat for the next two weeks, excluding Sundays. The Crown, represented by Mr. Glenn Hays, Q.C., called sixty witnesses. The appellant's trial counsel, Mr. Frank Donnelly, Q.C., called fourteen witnesses. The appellant did not testify.

[16] On September 30, the jury returned a verdict of guilty as charged, with a recommendation for mercy. The trial judge sentenced the appellant to death by hanging as was then required by the *Criminal Code*.

[17] An appeal of the verdict to the Ontario Court of Appeal was unanimously dismissed on January 20, 1960. On January 21, 1960, the Governor General in Council ordered that the appellant's death sentence be commuted to life imprisonment.

[18] On February 9, 1960, the appellant applied to the Supreme Court of Canada for leave to appeal the conviction. His application was dismissed on February 24, 1960.[2]

[19] Six years later, the publication of *The Trial of Steven Truscott*, authored by Isabel LeBourdais, sparked widespread public debate about the propriety of the appellant's conviction. On April 26, 1966, the Governor General in Council directed a reference of the case to the Supreme Court of Canada pursuant to s. 55 of the *Supreme Court Act*, R.S.C. 1952, c. 259. The terms of the Order in Council state: "…there exists widespread concern as to whether there was a miscarriage of justice in the conviction of Steven Murray Truscott and it is in the public interest that the matter be inquired into." The following question was referred to the Supreme Court for its determination:

> Had an appeal by Steven Murray Truscott been made to the Supreme Court of Canada, as is now permitted by section 597A of the Criminal Code of Canada, what disposition would the Court have made of such an appeal on a consideration of the existing record and such further evidence as the court, in its discretion, may receive and consider?

[20] In October 1966, the Supreme Court heard the testimony of sixteen witnesses called by the appellant and nine witnesses called by the Crown. The appellant also testified. The court received oral submissions from counsel in January 1967. In a decision released on May 4, 1967, the majority of the Supreme Court (Hall J. dissenting)

[2] On September 1, 1961, s. 597A of the *Criminal Code* came into force, which permitted a person facing the death penalty whose conviction had been affirmed by the Court of Appeal to appeal to the Supreme Court of Canada as of right on any ground of law or fact or mixed law and fact.

concluded that had an appeal of the case been heard by the court, it would have dismissed the appeal: *Reference re R. v. Truscott*, [1967] 2 C.C.C. 285.

[21] The appellant served most of his sentence while as a minor at the Ontario Training School for Boys in Guelph. At age eighteen, he was transferred to Collins Bay Penitentiary. He remained there until October 21, 1969, when he was released on parole. On November 12, 1974, he was granted relief from the conditions of parole for good behaviour. The appellant has not had any other involvement with the criminal justice system since his release from prison at the age of twenty-four. By all accounts, he has been a responsible and productive member of the community.

[22] On November 28, 2001, the appellant applied to the Minister under s. 690 [now s. 696.1] of the *Criminal Code* to review his conviction to determine if there is a reasonable basis to conclude that a miscarriage of justice likely occurred. The appellant argued to the Minister, as he now argues before this court, that numerous documents that existed in 1959 and 1966 were not disclosed to the defence and that these undisclosed documents undermine the Crown's theory of the case, including the incriminating medical evidence against him at the trial and the first Reference. The appellant further argued to the Minister, as he does now, that there is fresh evidence apart from the undisclosed documents that challenges the credibility of significant Crown witnesses and that also undermines the reliability of the medical evidence against him at the trial and the first Reference. In addition to presenting this material to the Minister, the appellant also

attempted without success to find exhibits collected from the crime scene that might yield DNA samples.

[23] On January 24, 2002, the Minister retained the Honourable Mr. Fred Kaufman, C.M., Q.C., to investigate the application and to provide advice and recommendations to the Minister. Mr. Kaufman and his counsel, Mark Sandler, conducted interviews with twenty-four witnesses, some of whom had testified for the Crown at trial. Mr. Kaufman's detailed investigative report was provided to the Minister in April 2004.[3] In it, he concluded that "there is clearly a reasonable basis for concluding that a miscarriage of justice… likely occurred."

[24] On October 28, 2004, the Minister granted the appellant's s. 696.1 application and referred his case to this court pursuant to s. 693(3)(a)(ii) of the *Criminal Code*. The terms of the Reference ask this court to determine, based on the existing evidentiary record and any further evidence we see fit to consider, the appellant's case as if it were an appeal on the issue of fresh evidence. We discuss the terms of the Reference and the meaning of these terms more fully in the next part of our reasons.

[25] The parties tendered a vast amount of material that they ask us to receive as fresh evidence under the terms of the Reference. Broadly speaking, there are three types of material being tendered as fresh evidence. The first type of material tendered by both the

[3] Mr. Kaufman's Report, edited for privacy concerns, was publicly released on November 28, 2005. In an endorsement dated December 14, 2004, this court held that Mr. Kaufman's report is not part of the court record on this appeal: [2004] O.J. No. 5052. Mr. Kaufman's investigation and his report on the results of that investigation were not subject to the rules of evidence and admissibility that apply on an appeal.

appellant and the Crown consists of the evidence of various witnesses who testified before this court in 2006. These witnesses include people who lived at the R.C.A.F. Station in 1959, legal counsel and police officers who were involved with this case, as well as experts in the fields of pathology, gastroenterology and entomology.

[26] The second type of material tendered by the parties as fresh evidence consists of the transcripts of witness examinations before Mr. Kaufman, affidavits and unsworn statements obtained by counsel, as well as reports prepared by certain experts who did not testify before this court. This body of material was placed before the court on the consent of the parties.[4]

[27] The third type of material tendered as fresh evidence consists of hundreds of documents recovered from various archival sources, including the Archives of Ontario, the archives of the Ontario Provincial Police, material from the original court file from the Goderich courthouse, files of the federal Department of Justice, and the personal files of Isabel LeBourdais, G. Arthur Martin, who represented the appellant on the 1966 Reference, and Dr. John L. Penistan, who performed the autopsy on Lynne Harper's body. Many, but not all, of these documents were considered by Mr. Kaufman in his report to the Minister.

[4] The parties' consent was subject to minor exceptions that are of no consequence to these reasons.

**Overview of the Case for the Crown and the Defence in the Prior Proceedings**

**(i) Outline of the Crown's case at trial**

[28] Identification of the perpetrator of the crime was the only issue at trial. The Crown's case against the appellant was entirely circumstantial. It rested on four main evidentiary pillars.

[29] The first pillar of the Crown's case consisted of the medical evidence on the time of Lynne Harper's death. The Crown relied on the opinion of the attending pathologist, Dr. Penistan, that Lynne died where her body was found and that her death occurred between 7:00 and 7:45 p.m. on June 9. Dr. Penistan based his opinion on the time of death on his observations of the stomach contents of the deceased, the degree to which *rigor mortis* affecting the body had subsided, and the extent to which the body had decomposed.

[30] The second pillar of the Crown's case consisted of the evidence of numerous witnesses regarding where they saw the appellant and Lynne, and where they did not see them, on the evening of June 9. This body of evidence is referred to in these reasons as the "County Road evidence". Crown counsel pointed out to the jury that the appellant was seen riding north on the County Road with Lynne on his bicycle at a location south of Lawson's Bush shortly after 7 p.m. Various Crown witnesses who were in the area north of Lawson's Bush, including at the bridge and the river,[5] testified that they did not

[5] Reference in these reasons to the "bridge"are to the bridge along the County Road spanning the Bayfield River, not to the nearby railway bridge. Both bridges are marked on the map in Appendix 1.

see the pair that evening. These witnesses included two children who claimed they were actively looking for the appellant. The Crown contended that the County Road evidence established that the appellant did not take Lynne to the intersection of the County Road and Highway 8, as he consistently claimed to police and others after Lynne went missing. Rather, on the Crown's theory, the appellant turned off the County Road with Lynne at about 7:15 p.m. and went down the tractor trail leading into Lawson's Bush. Thereafter, the appellant was not seen either with Lynne or by himself until approximately 8:00 p.m., when several children saw him return alone to the school grounds at the R.C.A.F. Station. The Crown urged the jury to find that he remained in the bush for some three-quarters of an hour, giving him ample time to commit the crime.

[31] The third pillar of the Crown's case consisted of evidence of post-offence conduct by the appellant that was said to demonstrate his guilty frame of mind in the aftermath of Lynne's disappearance. For example, the Crown adduced evidence to demonstrate the physical impossibility of the appellant's claim to police in the days immediately after Lynne's disappearance that, as he was standing on the bridge, he watched Lynne get picked up at the intersection of the County Road and Highway 8 by a late-model Chevrolet with a yellow licence plate.[6] The Crown put it to the jury that the appellant would not have been able to see the details of the car that he claimed to have seen and that his lies to the police were indicative of his guilt.

[6] The approximate locations of where the appellant said he was standing and where he said the car stopped to pick up Lynne are marked on the map in Appendix 1.

[32] Other post-offence conduct evidence relied on by the Crown included the trial testimony of the appellant's thirteen-year-old friend, Arnold George. George testified that the appellant had asked him to lie to the police and say that he had seen the appellant at the river on the evening of June 9. The Crown suggested to the jury that the appellant's conduct in asking his friend to lie to the police indicated "a pretty guilty frame of mind of Steven Truscott"

[33] The fourth pillar of the Crown's case consisted of medical evidence demonstrating that the appellant had sexually assaulted Lynne Harper and that he therefore had a motive to kill her. The Crown pointed to Dr. Penistan's opinion that Lynne Harper had suffered severe vaginal injuries indicative of a sexual assault. The Crown also relied on the evidence of the appellant's family physician, Dr. J. A. Addison, and the Senior Air Force medical doctor, Dr. David Hall Brooks, regarding their physical examination of the appellant on Friday, June 12, 1959. They testified that they had observed two large lesions on the sides of the appellant's penis, which in their opinion were between two to four days old and could have been caused by the sexual assault of a young girl.

[34] In summary, the Crown used the County Road evidence in combination with the medical evidence on time of death to advance its position that the appellant had the exclusive opportunity to commit the crime. The appellant's post-offence conduct and the lesions on his penis were presented as further evidence upon which the jury could be satisfied of his guilt.

**(ii) Outline of the defence case at trial**

[35] The defence relied on the evidence of various police officers and other Crown witnesses who recounted statements that the appellant made regarding his actions and whereabouts on the evening of June 9. In these statements, the appellant consistently claimed that, at Lynne's request, he gave her a ride on his bicycle from the school at the R.C.A.F. Station along the County Road to Highway 8, where he dropped her off at the intersection. He said that after dropping Lynne off, he rode his bicycle south on the County Road. He stopped at the bridge, looked back towards the intersection, and saw Lynne getting into a grey, late-model Chevrolet car with what appeared to be a yellow licence plate. He claimed that the car drove off in an easterly direction on Highway 8 towards Seaforth.

[36] The defence adduced additional evidence to support the appellant's claim that he and Lynne rode north of Lawson's Bush across the bridge to the highway, where he dropped her off. This confirmatory evidence came from three witnesses: Gordon Logan (age thirteen), Douglas Oates (age twelve), and Alan Oates (age sixteen).

[37] Gordon Logan testified that he was down at the Bayfield River on June 9 and that he saw the appellant and Lynne cross the bridge going north towards the highway. He was standing on a large rock in the river when he saw them pass by.[7] About five minutes later, he saw the appellant ride back to the bridge alone and stop there. He did not know what the appellant did after that.

[38] Doug Oates testified that some time after 7:00 p.m. on the night in question, he was standing on the north side of the bridge collecting turtles when the appellant and Lynne passed by him on the bridge. They were riding double on the appellant's bike and were going north towards the highway. He put up his hand and said "hi" and Lynne smiled. He did not see either of them again that night.

[39] Alan Oates testified that between 7:30 and 8:00 p.m. on the night of Lynne's disappearance, he was riding his bike north on the County Road and was about 800 feet from the bridge when he saw the appellant standing on the bridge looking east. The timing and location of this sighting corresponded with the appellant's account of his return trip from the highway.

[40] Also in response to the Crown's County Road evidence, defence counsel pointed out to the jury that no one saw the appellant and Lynne go into Lawson's Bush, even though it was daylight and many people were travelling along the County Road that evening. Defence counsel contended that it was impossible for the appellant to rape and

[7] The approximate location of where Gordon Logan said he was standing is shown on the map in Appendix 1.

murder Lynne in what counsel claimed was the half-hour period between when the appellant was seen departing from and returning to the school grounds. He also argued that the appellant's normal demeanour on returning to the school grounds, as described by several children who testified for the Crown, was inconsistent with him having committed this brutal crime.

[41] In response to the Crown's medical evidence, the defence called Dr. Berkeley Brown, a specialist in internal medicine. Dr. Brown testified that a determination of the time of death based on stomach contents is unreliable and that the stomach takes several hours longer to empty than Dr. Penistan had assumed. Defence counsel also asked the jury to accept Dr. Brown's testimony that it was unlikely that the lesions on the sides of the appellant's penis, as described by Drs. Addison and Brooks, were caused by sexual intercourse.

**(iii) Outline of the Crown's evidence in reply at trial**

[42] In reply, the Crown sought to challenge the credibility of Gordon Logan and Doug Oates who claimed that they saw the appellant cycling with Lynne across the bridge in the direction of the highway on the evening of June 9. Crown counsel called two witnesses who testified that it was not possible to see people on the bridge from Logan's sightline down on a rock in the Bayfield River. The Crown also called two witnesses who gave evidence to establish that Oates had left the bridge before 7:00 p.m. on June 9, and that he was therefore lying when he claimed to have seen the appellant and Lynne pass by him on the bridge sometime after 7:00 p.m.

**(iv) Outline of the additional evidence led by the Crown on the first Reference**

[43] The case for the prosecution on the first Reference was essentially the same as it had been at trial. The Crown led the evidence of four additional experts to support Dr. Penistan's opinion that Lynne Harper died between 7:00 and 7:45 p.m. on June 9: Dr. Noble Sharpe, medical director of the Attorney General of Ontario's crime laboratory; Dr. Cedrick Keith Simpson, a pathologist; Dr. Milton Helpern, a medical examiner; and Dr. Samuel Robert Gerber, a coroner.

[44] On the issue of the significance of the penis lesions observed by Drs. Addison and Brooks, Dr. Simpson acknowledged that the description of the lesions was not consistent with the kind of injury observed in a case of sexual assault. However, he testified that the lesions could have been the result of an aggravation of a pre-existing skin condition during a sexual assault.

**(v) Outline of the additional evidence led by the defence on the first Reference**

[45] Evidence introduced by the defence at the first Reference consisted of the appellant's own testimony, the results of certain visibility tests conducted on behalf of the defence, as well as forensic and medical evidence regarding the issue of the time of death and the cause of the penis lesions. This last category of forensic and medical evidence was clearly the central focus of the defence case.

[46] The appellant took the witness stand for the first time in 1966. He testified primarily about his movements and observations on the evening of June 9, 1959. The substance of his testimony before the Supreme Court was the same as the version of

events presented at trial that he had consistently given to the police and others in the days after Lynne disappeared. However, some parts of the appellant's testimony were clearly inaccurate. In some respects, far from assisting the appellant, these inaccuracies tended to contradict the defence position.

[47] The defence also introduced results of visibility tests to support the appellant's claim that while he stood on the bridge he was able to discern the make and licence plate colour of a car stopped at the intersection of the County Road and Highway 8. In addition, the defence tendered visibility evidence to support Gordon Logan's claim that he could identify the appellant and Lynne on the bridge from his position on a rock in the river, which was some 642 feet away from the bridge.

[48] As we have said, the central focus of the defence evidence on the first Reference consisted of forensic and medical evidence directed at challenging the Crown's evidence on time of death and the cause of the penis lesions. The defence called three pathologists - Dr. Frederick Jaffe, Dr. Francis Camps and Dr. Charles Petty - who testified to the effect that Dr. Penistan's narrow determination of the time of death based on stomach contents, *rigor mortis*, and decomposition was untenable, and that Lynne Harper's death likely occurred many hours later when the appellant would not have been with her.

[49] Drs. Camps and Petty further testified that it was highly unlikely that the penis lesions described by Drs. Addison and Brooks were caused by sexual intercourse. Also on this issue, the defence called two dermatologists, Dr. Charles Danby and Dr. Norman

Wrong, who testified that the lesions were much more likely caused by a dermatological condition. The appellant testified that about six weeks before his arrest, he noticed little blisters on his penis that continued to worsen. He said that he did not tell his father about this condition due to embarrassment, and that the first time he described the condition was to his counsel on the Reference, during a meeting at Collins Bay Penitentiary.[8]

**Summary of the Majority Decision of the Supreme Court of Canada on the First Reference**

[50] The majority of the Supreme Court viewed the conflict between the Crown's County Road evidence suggesting that the appellant and Lynne disappeared into Lawson's Bush and the defence evidence indicating that they had crossed the bridge and gone to the highway as "the critical issue in this case and entirely a jury problem." The majority concluded that the trial judge properly charged the jury on this critical issue and that the verdict reached by the jury was not unreasonable. According to the majority, it was implicit in the verdict that the jury completely rejected both the evidence of those witnesses who said that they had seen the appellant pass over the bridge with Lynne and the appellant's statements that he saw Lynne enter a car at the intersection.

[51] The majority said that the new evidence did not cause them to doubt the correctness of the verdict (at pp. 345-46):

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[8] This is an example of the appellant giving evidence that was not accurate and that did not inure to his benefit. The majority of the Supreme Court found it "impossible to accept Truscott's statement that he had never described the condition of his penis, as it existed prior to June 9, 1959, to anyone before he described it at the penitentiary to his counsel on the Reference" (*Reference re Truscott*, *supra*, at p. 344). However, according to Dr. Addison's testimony on a *voir dire* held during the trial, the appellant had mentioned during the medical examination on June 12 that his penis had been sore for about four or five weeks.

> There were many incredibilities inherent in the evidence given by Truscott before us and we do not believe his testimony. The effect of the sum total of the testimony of the expert witnesses is, in our opinion, to add strength to the opinion expressed by Dr. Penistan at the trial that the murdered girl was dead by 7:45 p.m. …
>
> We have already stated our conclusion that the verdict of the jury reached on the record at the trial ought not to be disturbed. The effect of the fresh evidence which we heard on the Reference, considered in its entirety, is to strengthen that view.

[52] It is against this backdrop that we turn to our analysis. We begin with our understanding of the nature and scope of the present Reference.

## PART II – THE NATURE AND SCOPE OF THESE PROCEEDINGS

### The Terms of this Reference

[53] The nature and scope of these proceedings are determined by the terms of the Reference and by the operation of the relevant provisions of the *Criminal Code*.

[54] The Reference to this court follows the appellant's application for a ministerial review of his conviction pursuant to s. 696.1 of the *Criminal Code* and the detailed report of Mr. Fred Kaufman provided to the Minister after a thorough investigation of the appellant's request. The essence of the Reference is captured in three paragraphs of the Minister's order. The first of these paragraphs reads:

> AND WHEREAS, new information has arisen concerning whether Steven Murray Truscott was guilty or not guilty of the murder of Lynne Harper, which information was not presented as evidence at trial, or on the appeal to this Honourable Court, or on the application for leave to appeal to

> the Supreme Court of Canada, or on the reference to the Supreme Court of Canada;

[55] In this paragraph, the Minister indicates that his decision to order the Reference was based on "new information" not brought forward either at the appellant's trial or on the first Reference. The new information is said by the Minister to be relevant to whether the appellant murdered Lynne Harper. In other words, the new information questions the appellant's factual guilt.

[56] The second significant paragraph provides:

> AND WHEREAS, I am satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred in this case;

[57] This paragraph tracks the statutory language of s. 696.3(3)(a). The Minister may order a reference only if satisfied that there is "a reasonable basis to conclude that a miscarriage of justice has occurred". The exact meaning of this standard is not in issue in these proceedings. It is fair to say, however, that by ordering this Reference, the Minister has indicated that, in his opinion, the new information raises real concerns about the correctness of the jury's verdict and the affirmation of that verdict by the Supreme Court of Canada.

[58] The Minister's assessment of the new information brought forward on the application to him cannot influence this court's ultimate determination of whether there has been a miscarriage of justice. For reasons that will be explained below, however, the Minister's concerns about the correctness of the verdict and the result of the first

Reference, implicit in his decision to direct a second reference, must influence our approach to concerns associated with the integrity of the criminal justice system when this court considers whether to admit evidence proffered on behalf of the appellant in these proceedings.

[59] The third and most important of the relevant paragraphs of the terms of the Reference provides:

> I HEREBY respectfully refer this matter to this Honourable Court pursuant to s. 696.3(3)(a)(ii) of the *Criminal Code*, based on a consideration of the existing record herein, the evidence already heard, and such further evidence as this Honourable Court in its discretion may receive and consider, to determine the case as if it were an appeal by Steven Murray Truscott on the issue of fresh evidence.

[60] Two observations as to the nature and scope of the present Reference flow from the language of this paragraph. First, the Reference is limited to "the issue of fresh evidence." This court is not asked to review either the trial record or the record on the first Reference for legal error. Nor is the court asked to opine on the reasonableness of the result in either of those proceedings. In short, we are not asked to decide what, if anything, went wrong in the prior proceedings. Rather, we are asked to decide whether the result of those proceedings, considered in the light of any fresh evidence we receive, amounts to a miscarriage of justice. If we conclude that a miscarriage of justice occurred based on the fresh evidence we receive, we must quash the conviction and then determine the appropriate remedial order.

[61] The second observation relates to the meaning of the phrase "existing record". The phrase is important because it helps determine what material can qualify as fresh evidence. In an endorsement in an earlier motion brought on this Reference, this court said:[9]

> The terms of the Reference ask us to decide the case as if it were an appeal on the basis of fresh evidence. We are asked to consider the fresh evidence in the context of the entire record to date, not just the trial record, but also the record as it was expanded on the 1966 Reference before the Supreme Court of Canada. … When one reviews the terms of the Reference, including the recitals, it is clear that "fresh evidence" refers to material that was not before the trial court, the Ontario Court of Appeal, or the Supreme Court of Canada. The "new information" referred to in the terms of the Reference refers to material that was not presented in prior court proceedings.

[62] We maintain that view. Evidence that in substance repeats evidence that was given at the trial or on the first Reference cannot in any meaningful sense be described as "new information" and thus cannot constitute fresh evidence on this Reference. For example, the Crown argues that the evidence heard on this Reference regarding the use of stomach contents to fix the time of Lynne Harper's death reploughs ground that was thoroughly worked at trial and again on the 1966 Reference. The Crown contends that the evidence heard on this Reference adds little or no new information to that longstanding debate, but only adds new voices. Were the court to accept the Crown's characterization of the evidence heard on this Reference pertaining to the use of stomach

[9] *Re Truscott* (2006), 211 O.A.C. 187 at para. 13.

contents to fix time of death, we would agree that the evidence could not constitute admissible fresh evidence. For reasons detailed below, we do not accept the Crown's characterization.

[63] The terms of the Reference also require the court to consider both the verdict at trial and the affirmation of that verdict at the first Reference. The appellant stands convicted today not solely because of the jury's verdict, but also because that verdict was affirmed on the Reference before the Supreme Court at which the appellant was free to challenge the verdict on any ground and to adduce any evidence that his counsel deemed appropriate. This court is asked to decide whether the conviction as affirmed on the first Reference amounts to a miscarriage of justice when considered in the light of any new evidence admitted on this Reference.

[64] This court must examine the admissibility of any proffered fresh evidence in the factual context of the evidence heard at trial and on the 1966 Reference. In deciding whether proffered evidence is potentially credible and could reasonably be expected to affect the result, we look at the state of the evidence as at the end of the first Reference. Similarly, if the court admits fresh evidence and concludes that there has been a miscarriage of justice, we will look at the evidence at trial and at the first Reference, as well as other material not previously judicially considered, in deciding on the appropriate remedy.

[65] While our focus on the combined effect of the evidentiary record from the prior proceedings somewhat restricts the evidence that is admissible on this Reference, it also benefits the appellant. Aspects of the Crown's case, such as the evidence concerning the lesions on the appellant's penis, were weakened by evidence led on the first Reference. The appellant has the benefit on this Reference of any evidentiary gains made at the previous Reference.

[66] One final point arises out of the terms of the Reference. The Supreme Court of Canada heard a great deal of evidence in 1966. The eight-person majority made credibility assessments and findings of fact based on that evidence. We must accept those assessments and findings on this Reference unless and until they are displaced by findings based on fresh evidence that we decide to admit on this Reference. For example, the majority concluded that the appellant's testimony on the first Reference was not worthy of belief: *Reference re R. v. Truscott*, *supra*, at p. 345. It is not open in these proceedings to review that finding on the basis of the evidence that was before the Supreme Court. The rejection of the appellant's evidence on the first Reference as untrue is part of the factual matrix within which this Reference must be decided. The significance, if any, of the rejection of his evidence to the outcome of this Reference is a matter for this court. We, of course, do not treat the rejection of the appellant's evidence as evidence of his guilt.

[67] A distinction must be drawn, however, between credibility assessments and findings of fact by the Supreme Court, on the one hand, and the analytical use to which

those assessments and findings may be put, on the other. This court is not bound to follow the analytical track taken on the first Reference. For example, it appears that the majority of the Supreme Court devalued the medical evidence they heard pertaining to the appellant's penis lesions and the time of Lynne Harper's death because they viewed the jury's verdict as signalling an outright rejection of the appellant's claim that he gave Lynne a ride to the highway on his bicycle. In the majority's view, this rejection was made independently of any assessment the jury may have made of the medical evidence. New evidence challenging the medical evidence did not, therefore, affect the reliability of the verdict in the majority's opinion: see *Reference re R. v. Truscott*, *supra*, at pp. 343-45.

[68] Whether the majority on the first Reference properly interpreted the jury's verdict or correctly approached its task under the terms of the first Reference is irrelevant in these proceedings. The terms of this Reference require this court to proceed "as if it were an appeal by Steven Murray Truscott on the issue of fresh evidence." That direction requires this court to assess the proffered evidence using the statutory and analytical framework applicable to fresh evidence tendered on an appeal from conviction. We must follow that course even if it is different from the course taken on the first Reference.

**The Relevant Provisions of the *Criminal Code***

**(i) The Reference is treated as an appeal**

[69] Part XXI.I of the *Criminal Code*, entitled "Applications for Ministerial Review – Miscarriages of Justice", describes a process that begins with an application by a person

convicted of an offence for a review of that conviction "on the grounds of miscarriage of justice": *Criminal Code*, s. 696.1(1). Section 696.2 delineates the Minister's review process. Section 696.3(3) provides that the Minister may dismiss an application, order a new trial, or, as he did in this case, refer the matter to the court of appeal. Section 696.3(3)(a)(ii) directs that a reference to the court of appeal shall be heard and determined "as if it were an appeal by the convicted person".

[70] Parliament's direction that references made under s. 696.3(3)(a)(ii) are to be treated as conviction appeals is significant. An appeal is not a wide-ranging investigatory process like a public inquiry or Mr. Kaufman's review on behalf of the Minister. Nor is an appeal a retrial of the allegations against the appellant, much less the kind of open-ended factual inquiry into past events that might be conducted by an historian or journalist. Rather, an appeal is an adversarial judicial process carried out in accordance with the statutory provisions of Part XXI of the *Criminal Code*. Those provisions define the appeal court's procedural, substantive and remedial powers.

[71] There are unique features to this Reference. Almost fifty years have passed since Lynne Harper's murder. The appellant has been through the normal appellate process and a reference to the Supreme Court of Canada where he was given a rare second chance to challenge the Crown's case and present a defence. The appellant's case has also been subject to intense scrutiny in non-judicial forums. Probably no other case in Canadian history has engaged the same level of judicial analysis and sustained public interest over so many decades.

[72] The unique features of this Reference do not, however, alter the basic appellate nature of the inquiry directed by s. 693.3(3)(a)(ii) of the *Criminal Code*. For example, under Part XXI, the rules of evidence applicable to criminal trials apply in determining the admissibility of material proffered as fresh evidence on appeal. The evidentiary difficulties encountered by the appellant because of the many years that have passed since the homicide do not permit this court to deviate from that evidentiary requirement so as to assist the appellant in making his claim that he has suffered a miscarriage of justice.

[73] Some of the features peculiar to this Reference may, however, influence the way the court exercises powers that are given to it under Part XXI. For example, the passage of time has made a retrial of the murder charge a practical impossibility. For reasons we will explain, this reality must be taken into account when we exercise our remedial powers.

[74] The appellate nature of these proceedings dictates that the appellant carry the burden of demonstrating based on evidence admitted on this Reference that there has been a miscarriage of justice. On conviction appeals, the court presumes the validity of the conviction until the appellant demonstrates otherwise. In these proceedings, the court begins from the dual premises, that on the evidence adduced at trial, the appellant was properly convicted, and on the material produced on the first Reference, that conviction was properly affirmed.

[75] In addition to carrying the ultimate burden of persuasion, an appellant also bears the onus of establishing any factual assertions that are material to arguments advanced in support of a motion to adduce fresh evidence. For example, on this Reference the appellant argues that certain documents were not disclosed to the defence at trial or on the first Reference. To the extent that the admissibility of any of the tendered documents depends on whether they were disclosed in prior proceedings, the appellant must establish on a balance of probabilities that there was non-disclosure.

**(ii) Our approach to the fresh evidence analysis**

[76] When fresh evidence is proffered on an appeal from conviction, the court engages in a two-stage analysis. First, it decides whether in light of the fresh evidence the conviction can stand, and second, if the conviction cannot stand, the court must determine the appropriate remedial order.

[77] At the first stage, the appellate court addresses the admissibility of the fresh evidence with a view to determining whether it sufficiently undermines the reliability of the verdict so as to render the conviction a miscarriage of justice. If the court is satisfied that the fresh evidence has that effect on the verdict and should be admitted, the appellate court must quash the conviction as a miscarriage of justice.

[78] Having quashed the conviction, the appellate court moves to the remedial stage of its inquiry. At this stage, the court decides whether to direct an acquittal or order a new trial. In some circumstances, if a new trial is ordered, the court may also have to decide

whether a stay of proceedings in respect of that new trial should be ordered. At this remedial stage, the court looks to the case against the appellant as it stands on the hearing of the appeal. The court will have regard to the evidence adduced at trial, the evidence admitted on appeal and any other material that could reasonably form part of the evidence at a new trial.

[79] As we have said in Part I of these reasons, our analysis follows this two-stage approach. We now explain the first stage of the analysis.

**(iii) Section 683(1) and the admissibility of evidence on appeal**

[80] Section 683(1) of the *Criminal Code* is the provision that empowers an appellate court to admit evidence on appeal. The first stage of the analysis just described begins at s. 683(1). The relevant provisions of this section state:

> 683. (1) For the purposes of an appeal under this Part, the court of appeal may, *where it considers it in the interests of justice,*
>
> **...**
>
> (*c*) *admit as evidence an examination* that is taken under subparagraph (b)(ii)
>
> (*d*) *receive the evidence,* if tendered, of any witness, including the appellant, who is a competent but not compellable witness; [Emphasis added.]

[81] The "interests of justice" control the admission of all evidence offered on appeal. That phrase signals a broad discretion to admit evidence following a context-sensitive inquiry into the totality of the circumstances.

[82] Evidence tendered on appeal falls into two overarching categories. The evidence in each category ultimately aims at the reliability of the verdict, but reaches that target through different routes. The most common kind of fresh evidence is directed at a finding of fact made at trial that was material to the verdict reached at trial. This kind of fresh evidence challenges the reliability of the verdict by producing evidence that the appellant claims could remove, or at least render unreliable, one of the factual underpinnings of the verdict. This kind of evidence essentially seeks to re-litigate with the assistance of new evidence a factual issue that was litigated at trial.

[83] Much of the material put forward by the appellant on this Reference fits within this category of fresh evidence. For example, it is implicit in the jury's verdict that it was satisfied beyond a reasonable doubt that Lynne Harper was murdered before 8:00 p.m. on June 9. The appellant has tendered medical and entomological expert evidence that he says disproves, or at the very least, puts into serious doubt the reliability of the finding that Lynne Harper died before 8:00 p.m. The appellant's counsel argue that without this finding, a jury could not convict. They contend that the fresh evidence demonstrates the unreliability of that finding and, consequently, the unsustainability of the conviction. They submit that a conviction based on an unreliable finding of fact constitutes a miscarriage of justice.

[84] The Crown attempts in part to counter the effect of this new evidence by adducing its own medical and entomological fresh evidence. The appellant's and the Crown's evidence will be examined in some detail in Parts III and V of these reasons.

[85] The second category of fresh evidence that may be tendered on appeal is not directed at re-litigating factual findings made at trial, but instead is directed at the fairness of the process that produced those findings. Where an appellant proffers this kind of evidence on appeal, he or she attempts to demonstrate that something happened in the trial process that materially interfered with his or her ability to make full answer and defence. An appellant claims that the verdict is rendered unreliable because the unfairness of the process denied the appellant the opportunity to fully and effectively present a defence and to challenge the Crown's case. When this kind of fresh evidence is received and acted on in the court of appeal, the conviction is quashed as a miscarriage of justice. The miscarriage of justice lies in the unreliability of a verdict produced by a fatally flawed process.

[86] Here, the appellant seeks to introduce material that challenges the fairness of both the trial and the first Reference. The appellant submits that a mass of important documentation was never disclosed to his counsel. He contends that, armed with this documentation, his previous counsel could have much more effectively challenged the Crown's case and buttressed his own version of events. For example, in respect of the County Road evidence, appellant's counsel have discovered many witness statements taken by the police from persons who were at the river and along the County Road on the evening of June 9. These statements were taken shortly after the homicide. The appellant strenuously argues that if his previous counsel, Mr. Donnelly or Mr. Martin, had had access to these statements, they could have not only destroyed the Crown's case

as to where the appellant was and was not on the County Road, but they could have also presented a much stronger exculpatory version of his comings and goings along that road.

[87] The two kinds of potential fresh evidence described above raise different issues for an appellate court to consider. However, there are two important characteristics that the two kinds of evidence share. First, both attack the reliability of the verdict. To succeed on appeal, whichever kind of fresh evidence is offered, the appellant must ultimately convince the appellate court that the fresh evidence sufficiently undermines the reliability of the verdict so as to warrant the conclusion that maintaining the verdict would amount to a miscarriage of justice. Second, both kinds of evidence lead to the same result: the quashing of the conviction. The second stage of the fresh evidence analysis, that is, the determination of the appropriate remedy, must follow regardless of which category of fresh evidence leads to the quashing of the conviction. At the remedial stage, the court can look at all of the material tendered by the parties.

[88] Counsel for the appellant have left no avenue unexplored in their efforts to produce fresh evidence to demonstrate that the appellant's conviction was a miscarriage of justice. Some of that material admits of a relatively straightforward fresh evidence analysis. Some of it raises complex and intractable analytical and forensic problems. We conclude, for reasons that we provide in Part III of these reasons, that some of the material tendered by the appellant to challenge the finding that Lynne Harper died before 8:00 p.m. should be admitted as fresh evidence on this Reference. The admission of that evidence compels the quashing of the conviction as a miscarriage of justice. We also

conclude that it is unnecessary to determine whether any of the rest of the material tendered by the appellant in these proceedings is admissible as fresh evidence. We are satisfied that the impact of the remaining material can be properly and fairly addressed at the second stage of our analysis when we consider the appropriate remedy.

[89] In the rest of this section, we set out the legal principles governing our determination that some of the evidence referable to the time of Lynne Harper's death should be admitted and that this evidence warrants the quashing of the conviction. We also explain why we do not address the admissibility of the rest of the material, particularly the material aimed at demonstrating the unfairness of the prior proceedings. In Part III of our reasons, we go on to examine in detail the evidence that we would admit as fresh evidence relating to the time of death.

**(iv) The legal principles governing the admissibility of the fresh evidence relevant to the time of death**

[90] The appellant challenges the finding that Lynne Harper died before 8:00 p.m. on June 9. To this end, the appellant led evidence from a number of qualified experts as well as certain material recovered from various archival sources to attack the credibility and reliability of the pathologist who testified for the Crown at trial, Dr. Penistan. The Crown relied heavily on his evidence to establish that Lynne Harper died before 8 p.m. We are satisfied that both the expert testimony and the archival material should be admitted as fresh evidence.

[91] The expert evidence and the archival evidence fall into the first of the two types of fresh evidence described above. To repeat, the appellant claims that this fresh evidence undermines a crucial finding of fact at trial – that Lynne Harper died before 8 p.m. The appellant argues that if that finding is undermined, the verdict must be quashed as a miscarriage of justice.

[92] The admissibility of this kind of evidence on appeal is tested against the criteria articulated by the Supreme Court of Canada in *R. v. Palmer and Palmer* (1979), 50 C.C.C. (2d) 193. Those criteria are well known. They encompass three components:

- Is the evidence admissible under the operative rules of evidence?
- Is the evidence sufficiently cogent in that it could reasonably be expected to have affected the verdict?
- What is the explanation offered for the failure to adduce the evidence at trial and should that explanation affect the admissibility of the evidence?

[93] The first two of these components are directed at preconditions to the admissibility of *Palmer* evidence under s. 683(1). Evidence that is not admissible under the usual rules of evidence governing criminal proceedings, or is not sufficiently cogent to potentially affect the verdict, cannot be admitted on appeal. The last component, sometimes referred to as the due diligence requirement, is not a precondition to admissibility. It becomes important only if the proffered evidence meets the first two preconditions to

admissibility. The explanation offered for the failure to adduce evidence at trial, or in some cases the absence of any explanation, can result in the exclusion of evidence that would otherwise be admissible on appeal.

[94] We will now examine the admissibility of the new evidence relevant to the time of Lynne Harper's death by reference to the three components of the admissibility analysis described above.

[95] Evidence is potentially admissible on an appeal, and consequently on this Reference, only if it would be admissible under the rules governing the admissibility of evidence in criminal proceedings. This is so for at least three reasons. First, binding precedent says so. Second, the rules of evidence governing the admission of evidence in criminal proceedings are shaped primarily to facilitate the search for the truth. That search is no less important and no different when considering the admissibility of evidence offered on appeal. Third, it would be irrational to use different rules governing the admissibility of evidence on appeal than at trial. It would not make sense to admit material on appeal that was not admissible under the usual rules of evidence and to order a new trial based on that material, only to have that material excluded at the new trial by the operation of the usual rules of evidence.

[96] The expert evidence relevant to the time of Lynne Harper's death is admissible under the rules governing the admission of evidence in criminal proceedings. There is no suggestion that the experts are not qualified or that their opinions otherwise run afoul of

any of the rules of evidence governing opinion evidence. The critical archival documents relied on are all arguably prior inconsistent statements made by the Crown witness, Dr. Penistan, and are admissible for impeachment purposes under the operative rules of evidence. Thus, the precondition that the material tendered on appeal be admissible evidence presents no hurdle to the admissibility of the evidence that we rely on in holding that the conviction must be quashed.

[97] It is appropriate to observe at this juncture that much of the evidence tendered by the appellant on other issues does raise significant questions as to the admissibility of the evidence under the governing rules of evidence. For example, much of the evidence offered for its truth would not be admissible under the rules governing hearsay evidence as they operated in 1959 and 1966. Counsel have argued, however, that the evidence is admissible under the modern principled approach to hearsay based on the touchstones of necessity and reliability. We do not have to determine admissibility of hearsay evidence in the context of considering the fresh evidence issue. We do, however, consider that issue to some extent when addressing the significance of this material at the remedial stage.

[98] Having concluded that the expert evidence relating to the time of death and at least some of the archival material challenging Dr. Penistan's credibility and reliability comply with the rules of evidence, we turn to the next component of the admissibility analysis under s. 683(1) – is the evidence sufficiently cogent to warrant its admission on appeal?

[99] The cogency criterion asks three questions:

- Is the evidence relevant in that it bears upon a decisive or potentially decisive issue at trial?
- Is the evidence credible in that it is reasonably capable of belief?
- Is the evidence sufficiently probative that it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result?

[100] The cogency inquiry requires a qualitative assessment of the evidence proffered on appeal. That evaluation must measure the probative potential of the evidence considered in the context of the entirety of the evidence admitted on appeal and heard at trial. If the fresh evidence considered in this context could reasonably be expected to have changed the result at trial, the evidence is sufficiently cogent to justify its admission on appeal, subject to a consideration of the explanation for the failure to lead that evidence. We are satisfied that the expert evidence pertaining to the time of death and some of the archival material challenging Dr. Penistan's reliability and credibility clear this hurdle for reasons explained in the next section.

[101] The third and final component of the admissibility analysis under s. 683(1) examines any explanation offered for the failure to adduce the evidence at trial. The explanation, or the absence of one, is sometimes referred to as the due diligence inquiry. This inquiry is important because the interests of justice that must be considered under

s. 683(1) go beyond the interests of the appellant and include the preservation and promotion of the integrity of the criminal justice process. The integrity of the trial process would be destroyed by the routine admission of evidence on appeal that could have been adduced at trial. The finality of the verdict returned at trial would be rendered illusory.

[102] The failure to offer an adequate explanation for not producing material at trial that is tendered on appeal will not necessarily lead to the exclusion of the evidence on appeal. Evidence may be so cogent that it should be received on appeal despite the absence of a satisfactory explanation for not leading the evidence at trial. It is also true, however, that evidence which is sufficiently cogent to warrant its admission on appeal may be excluded because of the absence of any adequate explanation for not adducing that evidence at trial. The failure to lead evidence at trial that is tendered for the first time on appeal becomes particularly important where the decision not to lead the evidence at trial was a considered, tactical decision by the defence.

[103] The Crown does not argue that the expert evidence produced on the present Reference was available in the prior proceedings. The Crown does argue, however, that this evidence is in substance identical to the expert evidence called at trial and on the first Reference. The Crown argues that the evidence heard on this Reference repeats and restates evidence called by the defence at trial and on the first Reference and should be excluded for that reason.

[104] The Crown also argues that the archival material now relied on by the appellant to impeach Dr. Penistan's credibility and reliability was available to the defence at trial and on the first Reference, or at a minimum, could have been available through the exercise of reasonable diligence by the appellant's previous counsel. The Crown argues that this material should not be admitted on appeal because it fails the due diligence inquiry.

[105] We reject the Crown's argument concerning whether the expert evidence is anything different from what has already been heard. For reasons we will explain, we think the expert evidence is quite different from the evidence that was led in the prior proceedings.

[106] We also reject the Crown's argument that we should exclude the documentation that could impeach Dr. Penistan on the basis that it was reasonably available at a prior proceeding. There is no foundation for ascribing any tactical motivation to counsel for the appellant in respect of this documentation. It would be dangerous to attempt to discern through the fog of time why, almost fifty years ago, counsel did or did not pursue certain tactics or seek production of certain material from the Crown. All counsel on this Reference acknowledge that the appellant was the beneficiary of a vigorous and expert defence at trial and on the first Reference. We cannot think of any reason why the defence would not have used the material now available to challenge Dr. Penistan's opinion as to the time of death if counsel had been aware of its existence. Nor can the due diligence of counsel in 1959 and 1966 be measured against contemporary standards or with the knowledge that comes from hindsight. The disclosure rules and counsel's

obligations with respect to production of material in the hands of the prosecution are very different today than they were in 1959 and 1966. We are not satisfied that this material was available to appellant's counsel or that it could have been available through the exercise of reasonable diligence.

[107] Moreover, the public interest in preserving the finality of trial verdicts may be different when considering the "interests of justice" on a reference directed under s. 696(3)(a)(ii). The Minister, exercising the statutory authority given to him by Parliament, has directed this court to consider whether the appellant's conviction represents a miscarriage of justice in the light of new information. By directing this Reference, the Minister has reopened the appellant's conviction for further judicial scrutiny. This is obviously an extraordinary step, and even more so in this case where there has already been one reference. By ordering this Reference, the Minister has determined that the integrity of the criminal justice system demands a reassessment of the reliability of the conviction and the result of the first Reference, with the advantage of any fresh evidence that this court decides to receive.

[108] In other words, by ordering this Reference, the Minister has determined that a further judicial inquiry is necessary to clear the cloud overhanging the appellant's conviction. By doing so, the Minister has indicated that the integrity of the criminal justice system will best be maintained by considering the admissibility of evidence on its merits and not by excluding otherwise admissible fresh evidence for want of due diligence in the name of finality concerns.

[109] Our conclusion that, in the circumstances of this Reference, finality concerns should not operate to exclude evidence that meets the cogency criteria for the admission of fresh evidence will not necessarily apply in other references. There may be references unlike this one, where reliable evidence is available that permits the court to make informed assessments about what evidence was available to the defence at trial, and why that evidence, if it was available, was not led or used by the defence. The court's ability to make a valid due diligence assessment on a reference may impact on how finality concerns are factored into the determination of whether the admission of the fresh evidence is in the interests of justice. There may also be references where an appellant seeks to resile from a position taken in earlier proceedings and to advance a new defence. That kind of case, too, may raise very different finality concerns.

[110] The admissibility stage of the two-stage fresh evidence analysis is completed by a consideration of the effect on the conviction of admitting the fresh evidence. Section 686(1)(a) of the *Criminal Code* sets out the grounds upon which an appellate court can allow an appeal from conviction. The language of the section does not fit easily with appeals that are allowed on the basis of fresh evidence. Section 686(1)(a)(iii) is the only provision that is potentially relevant. It allows an appellate court to grant an appeal "on any ground there was a miscarriage of justice". This power can reach virtually any kind of error that renders the trial unfair in a procedural or substantive way. The section has been applied on appeals where there was no unfairness at trial, but evidence was admitted on appeal that placed the reliability of the conviction in serious doubt. In these cases, the

miscarriage of justice lies not in the conduct of the trial or even the conviction as entered at trial, but rather in maintaining the conviction in the face of new evidence that renders the conviction factually unreliable.

[111] On the Crown's theory as presented at trial and maintained on the first Reference, it was essential that the Crown prove that Lynne Harper was murdered before the appellant was seen by various children returning to the school grounds at around 8 p.m. Fresh evidence that we discuss in detail in the next part of our reasons casts real doubt on the reliability of the evidentiary basis for that allegation. We are satisfied that if that evidence had been before the jury or the Supreme Court, it could reasonably be expected to have affected the result of those proceedings. Thus, the conviction cannot stand and must be quashed as a miscarriage of justice.

**(v) Why we do not address the appellant's unfairness claim**

[112] Before we turn to a more detailed examination of the evidence pertaining to Lynne Harper's time of death that we would admit on this Reference, in deference to the appellant's detailed submissions, we explain briefly why we do not decide the admissibility of the evidence offered to demonstrate the fundamental unfairness of the trial and the first Reference.

[113] As indicated above, the evidence tendered to demonstrate the unfairness of the prior proceedings consists of a mass of material discovered by appellant's counsel before and after the application for this Reference was commenced. The material comes from many sources and touches on almost every factual issue raised at trial.

[114] There are several reasons why we do not address the ultimate admissibility of this evidence. First, it is unnecessary to do so. On the evidence we would admit, the conviction must be quashed. That is the same result that would occur were we to admit the evidence said to demonstrate the unfairness of the prior proceedings.

[115] Second, the appellant does not suffer any prejudice from the overall outcome of the Reference by our determination that we should assess only the admissibility of the medical evidence relevant to the time of death. The impact of the material discovered by counsel for the appellant and allegedly not produced in prior proceedings can be measured when considering the appropriate remedy after having determined that the conviction should be quashed.

[116] Third, the appellant's unfairness claim raises substantial problems of proof. Most of the people who played any significant role in the trial or the first Reference died before the disclosure issues were raised. Those who were available spoke, quite understandably, in generalities and surmises rather than based on actual recollections of relevant events. The court is left to speculate about what people knew or did not know and what they did or did not do almost fifty years ago.

[117] In their attempt to bridge this lengthy gap, counsel for the appellant rely on a variety of second-hand sources such as letters between deceased people. This correspondence raises its own evidentiary problems. It is hearsay and *prima facie* inadmissible.

[118] Appellant's counsel also rely on the disclosure practices that existed in 1959 and 1966. Certainly based on those practices, much of the material put forward on this Reference would not have been disclosed to counsel for the appellant at trial or on the first Reference. There is evidence that the normal disclosure practices were followed at trial. There is also, however, some evidence to suggest that the Crown followed an "open brief" policy with Mr. Martin on the first Reference.

[119] Even if one could come to some conclusion as to what documents were actually disclosed or not disclosed to the defence, non-disclosure of the relevant documents cannot be equated with non-disclosure of the content of the documents. Disclosure practices in 1959 and 1966 were informal and varied. There is simply no way of coming to any informed conclusions as to what Mr. Donnelly or Mr. Martin did or did know about the content of the various documents now produced by the appellant. On the record we have, one could well conclude that the appellant's prior counsel were unaware of the information in some of the documents produced on this Reference, aware of the information in others, and that no finding either way could be made with respect to other documents.

[120] It is dangerous to draw inferences about what information was available to counsel based on their conduct of the trial and the first Reference. Criminal cases were tried very differently in 1959 than they are now. The Reference in 1966 was by no means a criminal trial in the usual sense. The decisions Mr. Martin made as to what issues should

or should not be advanced on the first Reference no doubt took into consideration the unique forum in which he was presenting his case.

[121] In the end, it is wrong to assume that capable counsel in 1959 or 1966 - and everyone agrees that Mr. Donnelly and Mr. Martin were capable - would necessarily use the approach that counsel might use today. It would be risky in the extreme to draw inferences, be they for or against the appellant's unfairness claims, based on the conduct of his previous counsel. We proceed on the basis that counsel did what they thought was best in the circumstances and that they demonstrated a high level of competence and professionalism in the conduct of the appellant's defence.

[122] A fourth problem with trying to address the unfairness argument on its merits is the difficulty in measuring fairness. Should we apply the standards of 1959 and 1966 or the standards of today? The appellant would approach the claim, at least in part, on the basis that present-day disclosure standards to which Crown counsel must now adhere are the measure of fairness. Arguably, however, this approach is akin to using present-day medical standards to decide whether a diagnostic protocol followed in 1959 amounted to malpractice.

[123] Finally, we are concerned that any attempt to assess the merits of the appellant's unfairness claim, and we do not deny that the claim may have merit, could produce its own unfairness. Were we to find on this record that the trial or the first Reference was fundamentally unfair because the appellant did not receive information essential to his

defence that was in the Crown's possession, that finding could well reflect adversely on those responsible for the prosecution at trial and on the first Reference.

[124] Any court must go where the evidence takes it and decide the issues that must be decided even if those decisions do harm to the reputation of otherwise respected individuals. Where, however, the evidentiary record is far from clear and the issues do not need to be resolved to do justice in the case, decency dictates that the court avoid stretching the evidence to make factual findings that could irreparably harm the reputation of individuals who will never have the opportunity to respond to the allegations made against them.

[125] In the next part of our reasons, we describe in detail the critical fresh evidence relevant to the issue of the time of Lynne Harper's death. In Part IV, we return to the issue of our approach to determining the appropriate remedy.

## PART III – WHEN DID LYNNE HARPER DIE?

[126] The cause of Lynne Harper's death has never been in dispute. Lynne's assailant strangled her by winding her blouse tightly around her neck and securing it with a knot. The time of her death has been the subject of intense controversy from the outset.

[127] On the Crown's theory as presented at trial and on the first Reference, the window of time within which the appellant could have killed Lynne was a narrow one, namely, from about 7 to 8 p.m. on the evening of June 9. The Crown did not suggest that the appellant had the opportunity to kill Lynne some time later that evening. If Lynne was

killed some time after the appellant returned to the school grounds at about 8 p.m., the Crown's theory collapsed. Conversely, if Lynne was killed before the appellant returned to the school grounds at about 8 p.m., then it was virtually certain that he killed her. He acknowledged being with her and was seen with her on his bicycle after 7 p.m. that evening in close proximity to Lawson's Bush where her body was found.

[128] At trial, the Crown led the evidence of Dr. Penistan, a pathologist with the Department of the Attorney General of Ontario, on the central issue of the time of death. Dr. Penistan performed the autopsy on Lynne Harper's body on the day she was found, Thursday, June 11, 1959. He testified before the jury that he would put Lynne Harper's time of death as prior to 7:45 p.m. on June 9. He based this opinion on three factors: the state of the contents of Lynne's stomach, the degree of decomposition of her body, and the extent to which the body was still affected by *rigor mortis*.

[129] At the 1966 Reference, counsel for both sides called a total of seven highly-qualified experts who gave evidence for and against the soundness of Dr. Penistan's opinion on the time of death. The debate centred primarily on whether the state of the stomach contents could be used to fix the time of death within a limited period. The majority of the Supreme Court of Canada concluded that the weight of the medical evidence before them supported Dr. Penistan's opinion that it could.

[130] On the present Reference, the appellant and the Crown relied on the evidence of three more pathologists and one gastroenterologist on the issue of the time of death. The

appellant also tendered several documents found in the archives that were not considered in the previous judicial proceedings and that bear on this issue.

[131] In order to assess the admissibility of this body of evidence, we first discuss the nature of the evidence that Dr. Penistan gave at the appellant's trial. We then briefly summarize the voluminous evidence that was presented to the Supreme Court of Canada in 1966 on time of death and the majority's conclusion as to the effect of that evidence. We go on to summarize the pathology and gastroenterology evidence of the experts called by the parties on the present Reference. Finally, we explain why the evidence relied on by the appellant relating to the time of death is admissible on this Reference.

**The Medical Evidence on the Time of Death in the Prior Proceedings**

**(i) Trial testimony of the Crown and defence experts**

[132] Dr. Penistan attended at the scene where Lynne Harper's body was found at about 4:45 p.m. on June 11. He was accompanied by the Senior Medical Officer at the R.C.A.F. Station in Clinton, Flight Lieutenant Dr. David Hall Brooks. Dr. Penistan began his autopsy on the body at 7:15 p.m. that same evening and Dr. Brooks assisted him.

[133] At trial, Dr. Penistan testified that the contents of Lynne Harper's stomach, which he had removed and placed in a jar, measured approximately one pint in volume. The food was not well chewed and very little of the meal had passed from the stomach through the duodenum into the small intestine. He recognized peas, onions, a few pieces

of meat, one bit of which he thought was ham, another of which was white meat, either chicken or turkey.[10]

[134] Dr. Penistan indicated that under normal conditions, the process of digestion and the emptying of the stomach is normally completed within two hours. If he found a normally chewed meal, digested to the slight extent as the food found here, he would conclude that it had not been there for more than an hour. In this case, however, he made some allowance for the poorly chewed food and opined that it had not been in the stomach for more than two hours. He added that it "certainly [could] have been there for a lesser time", and gave the estimate of "between one and two hours". After discussing Mrs. Harper's testimony that Lynne had finished her last known meal at a quarter to six, the following exchange took place between Crown counsel and Dr. Penistan:

> Q. On that basis, sir, would you put her time of death at …
>
> A. As prior to a quarter to eight.
>
> Q. As early as –
>
> A. Probably between seven and a quarter to eight.

[135] In addition to using stomach contents as the basis for his opinion that Lynne Harper died prior to 7:45 p.m., Dr. Penistan also relied on his observations as to the extent of decomposition of the body and the degree to which it was affected by *rigor mortis*. He testified in chief:

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[10] Lynne's mother testified that Lynne's last meal consisted of boiled potato, peas, and turkey with stuffing. There were other items on the table, such as cranberry sauce, and bologna and ham in the ice-box.

> Q. Apart from the stomach, these contents, Doctor, is there any other observations that would assist in determining the cause of death or the time of death?
>
> A. Yes sir. I refer in my description of the body to the postmortem changes which were beginning to occur in the fat underneath the skin and in the lungs and indeed, in most of the organs in the body. I also refer to the fact that *rigor mortis* was still, although only just, demonstrable. Having regard to the environment and the atmospheric conditions about that time, which as I recollect clearly the weather was hot and the environment was damp, conditions under which changes tend to take place rather more rapidly than usual, I felt that these – the state of the body suggested that death had occurred some two days previously.
>
> Q. I take it, doctor, that is supplementary to your stomach observations?
>
> A. That is divorced from the observations on the stomach. Should I add it was my view that the changes were entirely compatible with the time of death as shown from the stomach contents and the other evidence.

Dr. Penistan did not provide any further testimony at trial regarding his observations as to the state of decomposition or *rigor mortis* affecting the body.

[136] In cross-examination, Dr. Penistan was not asked if the state of the stomach contents could be consistent with death after 7:45 p.m. Regarding postmortem changes in the body, Dr. Penistan conceded that those changes are not a very accurate way of estimating the time of death and that "it would be difficult to tie it down within five or six hours of those changes".

[137] Dr. Penistan also admitted on cross-examination that he had said nothing at the preliminary inquiry about seeing white meat or fowl in the gastric contents. The trial

judge asked Dr. Penistan to check his original notes on this subject and Dr. Penistan conceded, "I must say my notes say there was no meat. There was no obvious meat."

[138] Defence counsel questioned Dr. Penistan in general terms about the variability of the digestive process. Dr. Penistan agreed that emotion can be a considerable factor affecting this process and that emotional upset or anger would lead to the slowing of the digestive process. He further agreed that improperly masticated food could slow the digestive process. He acknowledged that he had no scientific data specifically about the effect that improperly chewed food would have on the digestive process of a twelve-year-old girl.

[139] The defence called Dr. Berkeley Brown, a specialist in internal medicine, to challenge the soundness of Dr. Penistan's opinion on the time of death. Dr. Brown testified that the stomach would empty a well-chewed meal in three and a half to four hours, while a poorly masticated meal would add "probably an hour" to that time. He said that he and experts in the field generally held that gauging the postmortem interval by the contents of the stomach must be done with great caution because there are such wide variations in the stomach-emptying process.

**(ii) Closing arguments at trial on the medical evidence on time of death**

[140] In his closing address to the jury, defence counsel attacked Dr. Penistan's evidence in two ways. First, he suggested that the jury should prefer the opinion of the defence expert, Dr. Brown, because he specialized in diseases of the stomach. Dr. Brown's testimony was that the stomach's normal emptying time is three and a half to four hours,

not the two hours given by Dr. Penistan. Second, defence counsel suggested that little weight should be given to Dr. Penistan's examination of the stomach contents because he testified that he identified white meat and ham, but his autopsy notes recorded that he identified "no obvious meat".

[141] The Crown highlighted Dr. Penistan's opinion that the time of death was between 7:00 and 7:45 p.m., an hour and fifteen minutes to two hours after Lynne's last meal. According to Crown counsel, although the premise of Dr. Penistan's analysis was that the stomach is usually empty after two hours, Dr. Brown's disagreement regarding the length of time it takes for the stomach to empty was not relevant to the issue of the time of death because the stomach in question was not empty but "was, largely, a full stomach".

[142] The Crown also emphasized that Dr. Brown had not had the benefit of seeing the body and examining the stomach contents, or observing signs of decomposition and *rigor mortis*, as Dr. Penistan had. Crown counsel assured the jury that they could assume from Dr. Penistan's years of experience and official position that he would be cautious in his estimate, and that based on stomach contents, decomposition and *rigor mortis*, the jury could safely assume that Lynne Harper was killed between 7:00 and 7:45 p.m. Crown counsel concluded this aspect of his summation by saying:

> Now, we come to apply that opinion of time of death and I suggest to you Gentlemen, it is awfully important when this girl died. Now, who was with her during this time? What person or persons had the opportunity to kill her from 7:00 p.m. to 7:45 p.m.? I suggest that a review of the facts

> narrows those facts like a vice on Steven Truscott and no one else.

**(iii) Trial judge's charge to the jury on time of death**

[143] In his charge to the jury, the trial judge summarized Dr. Penistan's evidence as follows:

> Doctor Penistan said, having regard to the food that he found in her stomach, and the fact that in his opinion the stomach empties itself after a meal within two hours, that she had died within two hours after having her supper.
>
> The evidence was that she had left home at a quarter to six, that she had finished her supper, I should say, at a quarter to six in the evening, so Doctor Penistan concluded that she had died before a quarter to eight.

[144] After reviewing the entirety of the evidence in some detail, the trial judge brought together the competing opinions of Drs. Penistan and Brown in this way:

> According to Doctor Penistan, and to the medical evidence, she died at a time which is not altogether, in any view, inconsistent with her having finished her dinner at about quarter to six. Doctor Brown says, and I must draw it to your attention, that it takes three and a half to four hours to empty the stomach and it is on the basis of that that the defence asks you to say that she could not have been killed before Steve returned at 8:00 p.m. You have Doctor Brown's testimony. It is unfortunate always, that medical men should disagree on what is more or less a scientific point. Doctor Brown says three and a half to four hours.
>
> Now, the stomach, of course, was not empty. Doctor Penistan said there was still a pint of food in stomach and he removed that pint. It is true there is not a pint of food in the bottle now, and it is for you Gentlemen to accept or reject Doctor Penistan's evidence that he took a pint out, but Doctor Brooks was there and saw the pint. Don't forget that the bottle went to the Attorney General's Laboratories, for tests

> and we don't know exactly what happened to it there except it was handed to some man whom we have not seen. It will be for you to say whether you accept Doctor Penistan's theory, an Attorney-General's Pathologist of many years standing, or do you accept Doctor Brown's evidence.

[145] Mr. Donnelly, in his closing, had outlined the differences in the opinions of the two doctors. He objected that the trial judge had "dismissed very summarily" the evidence of Dr. Brown and sought correction on this point. The judge then addressed the issue again before the jury:

> I am asked to point out to you that the theory of defence is that Doctor Penistan is in error when he says it only takes an hour to two hours to empty the stomach and you can accept the evidence of Doctor Brown, or at least, Doctor Brown's evidence should raise doubt in your mind. You can understand the point is that his theory is that food took three and a half hours from a quarter to six to leave the stomach, that she must have died at a time later than the time that Steven was at the river, that she must have died after Steven came home, and therefore, it couldn't be Steven that killed her. That is what the theory of the defence is. I am not going to go over all the evidence again.

**(iv) Evidence on time of death at the 1966 Reference and the Supreme Court of Canada's interpretation of this evidence**

[146] We now review the pathology evidence presented to the Supreme Court at the 1966 Reference in order to complete the context in which the proposed fresh medical evidence is being introduced in these proceedings.

[147] At the 1966 Reference, Dr. Penistan's opinion on the time of death was a major focus of the appellant's attack on the jury's verdict. The appellant called three experts: Dr. Petty, Assistant Medical Examiner for Maryland; Dr. Jaffe, a regional pathologist

who was about to succeed the Crown's expert, Dr. Sharpe, as medical director at the Attorney General's crime laboratory in Toronto; and Dr. Camps, a leading English pathologist. They were all of the opinion that the time of death could not be expressed within the narrow confines given by Dr. Penistan, although they agreed that they could not exclude the possibility that death occurred in this time frame.

[148] Dr. Petty said that the time of death could be judged by means of stomach contents only "within very broad limits" – from thirty minutes up to eight hours. Dr. Jaffe described stomach contents as a "most unreliable guide to the time of death", noting that two equally competent observers could reach different conclusions on the same evidence, making it "basically a useless method." Dr. Camps said that it would be "quite impossible" to use the contents of the stomach and the state to which digestion has proceeded as a reliable guide to the time of death.

[149] Another point made by Dr. Petty was that Lynne Harper's emotional state could have affected her digestive process. He contended that her annoyance at having been refused permission by her parents to go swimming that evening[11] and her possible state of fear at being abducted by her sexual assailant and killer were factors that should have been considered.

[150] In the photographs of the body, Dr. Petty said he observed no visible indicia of decomposition, such as bloating and pronounced venous patterning. He was of the

[11] We refer at greater length to the issue of Lynne's mood on the evening of her disappearance in Part V of our reasons at paras. 671-674.

opinion that significantly more *rigor mortis* in Lynne Harper's body was indicated than that documented by Dr. Penistan. All of the experts agreed that the extent of *rigor mortis* was not a reliable indicator of the time of death except within very broad parameters. Dr. Jaffe regarded the absence of postmortem changes as being an outstanding feature of the body.

[151] The Crown called four experts who supported Dr. Penistan's opinion that the food in Lynne Harper's stomach had been there for less than two hours and that death occurred by 7:45 p.m.: Dr. Sharpe, the medical director at the Attorney General's laboratory; Dr. Simpson, Dr. Camps' professional rival from England; Dr. Helpern, New York City's Chief Medical Examiner; and Dr. Gerber, the coroner for the City of Cleveland**.**

[152] Dr. Sharpe's opinion was based in part on the consistency of the stomach contents and the pH level, which indicated the contents were strongly acidic. The premise for Dr. Simpson's opinion was that the "main mass of the meal" would be gone within two hours and that most of Lynne Harper's meal was still in her stomach. He testified that Dr. Penistan was right to say that "what seemed most usual and likely under ordinary circumstances was that this was a meal taken something inside two hours of death." Although Dr. Simpson acknowledged that emotions can affect the stomach and slow the process of digestion, he said he "just did not know of any" complicating factors that would delay digestion in this case. Dr. Helpern also acknowledged the role of fear and anger in delaying digestion. However, he said that in his opinion, from the amount of food in the stomach, Lynne Harper died "no more than two hours after the food was

ingested. I think that is the rule in these cases." Dr. Gerber was not asked the reason for his opinion that Dr. Penistan was correct and gave none.

[153] The majority of the Supreme Court concluded that the weight of the new evidence relating to time of death supported Dr. Penistan's opinion that death occurred prior to 7:45 p.m. The following are the main passages from the majority's judgment on this issue (at pp. 342 and 345):

> On the subject of *rigor mortis*, we think that the man who actually saw the condition had an overwhelming advantage over those who were testifying from photographs. [Dr. Penistan] says that the condition had almost passed off.…We are of the opinion that Dr. Penistan's evidence on *rigor mortis* must be accepted and that defence evidence on this subject tending to put the time of death at a later hour must be rejected.
>
> On the question of the contents of the stomach and the state of digestion as indicating the time of death, there was diversity of opinion. Doctors Sharpe, Simpson, Helpern and Gerber supported Dr. Penistan's opinion that death occurred prior to 7:45 p.m. Dr. Petty, Dr. Jaffe and Dr. Camps rejected any possibility of such precise definition.
>
> …
>
> We think that the evidence indicates that this was the same meal that the girl had finished eating at 5:45 p.m. We know the time of the meal. This was a normal healthy girl of 12 years and 9 months who had eaten a normal meal. There is no evidence of any complicating factor apart from an expression of annoyance because she could not go swimming.
>
> …
>
> The effect of the sum total of the testimony of the expert witnesses is, in our opinion, to add strength to the opinion

> expressed by Dr. Penistan at the trial that the murdered girl was dead by 7:45 p.m.

**(v) The significance of Dr. Penistan's evidence on time of death**

[154] The appellant contends that Dr. Penistan's evidence effectively led the jury to believe that he could fix Lynne Harper's time of death as between 7:00 and 7:45 p.m. based on his examination of her stomach contents. That conclusion was reinforced by the state of decomposition of the body and the extent of *rigor mortis*. Although the latter factors were less precise means of estimating the time of death, they were entirely compatible with death having occurred between 7:00 and 7:45 p.m.

[155] The Crown's position is that Dr. Penistan's opinion on the time of death based on stomach contents was not an expression of scientific certainty**,** but rather was an estimation that Lynne Harper "probably" died between 7:00 and 7:45 p.m. Crown counsel submit that Dr. Penistan qualified his opinion, acknowledging that it was based on the normal process of digestion and that many factors may speed or slow the digestive process. Dr. Penistan agreed that postmortem changes are not an accurate way of assessing time of death. Significantly, defence counsel never asked Dr. Penistan if his findings were compatible with a time of death later than 8:00 p.m.

[156] We cannot accept the Crown's submission that Dr. Penistan did no more than express an estimate that Lynne Harper probably died between 7:00 and 7:45 p.m. but that she could also have died later. Nor do we accept that his opinion indicated that her death was merely compatible with this time frame.

[157] First, Dr. Penistan's testimony at trial was that the food he observed in Lynne Harper's stomach had not been there for more than two hours. While he allowed for some uncertainty as to the commencement of the relevant period, he was clear that, in his opinion, death occurred no later than 7:45 p.m.

[158] Dr. Penistan's official autopsy report was to the same effect, albeit slightly even more precise than the opinion he expressed at trial. It indicates that death occurred between 7:15 and 7:45 p.m. The following passage from the official report, which was disclosed to the defence at the 1966 Reference, states:

> The limited degree of digestion, and the large quantity of food in the stomach. I find it difficult to believe that this food could have been in the stomach for as long as two hours unless some complicating factor was present, of which I have no information. If the last meal was finished at 5:45 p.m. I would therefore conclude that death occurred prior to 7:45 p.m. The finding would be compatible with death as early as 7:15 p.m.

Dr. Penistan's report could not have been more clear that, based on his forensic findings, Lynne Harper was dead by 7:45 p.m.

[159] Second, Dr. Penistan testified that, having regard to the extent of *rigor mortis* and the state of decomposition, death occurred some two days prior to the autopsy. Although he acknowledged in cross-examination that postmortem changes cannot be used to accurately estimate the time of death, his evidence clearly left the impression that the state of *rigor mortis* and decomposition provided independent support for his opinion of the time of death based on stomach contents.

[160] Third, we consider it significant that the trial participants did not view Dr. Penistan's evidence in the way the Crown now characterizes it. Experienced defence counsel who heard Dr. Penistan's evidence certainly did not try to interpret his opinion on the time of death as admitting of the flexibility now urged by the Crown. The trial Crown invited the jury to conclude based on Dr. Penistan's opinion that the appellant had the exclusive opportunity to kill Lynne Harper. The trial judge did not instruct the jury that the Crown had overstated Dr. Penistan's evidence in this regard.

[161] Finally, the experts who testified before the Supreme Court on the 1966 Reference all proceeded on the basis that Dr. Penistan's opinion was that Lynne Harper was dead by 7:45 p.m. on June 9. And it is clear from the majority of the Supreme Court's reasons cited above that they viewed his opinion the same way.

[162] For these various reasons, we reject the Crown's argument that Dr. Penistan's opinion on the time of death was a qualified one which offered the possibility that Lynne Harper could have died after 7:45 p.m.

**The Fresh Evidence on the Present Reference**

[163] The majority of the Supreme Court's conclusion that "the weight of the new evidence supports Dr. Penistan's opinion" provides the base line for our assessment of the significance of the fresh expert evidence: does the weight of the new evidence support Dr. Penistan's opinion that Lynne Harper was dead by 7:45 p.m. on June 9? We

first summarize the fresh pathology and gastroenterology evidence on this issue and then assess its admissibility.

[164] The appellant tendered the evidence of two experts in the field of pathology, Dr. Michael Pollanen and Dr. Bernard Knight. The Crown tendered the evidence of Dr. Werner Spitz in the field of pathology and Dr. Nicholas Diamant in the field of gastroenterology. Each of these experts testified before us. The Crown also tendered a brief report by Dr. Vincent DiMaio, a pathologist. Neither side chose to call him and we do not comment on his evidence, which did not add anything to the testimony we heard.

[165] Before we summarize this evidence, we must comment on the evidence of the Crown's expert, Dr. Spitz, who has been a forensic pathologist for more than fifty years. Dr. Spitz provided the opinion that Dr. Penistan's determination that Lynne Harper died by 7:45 p.m. is "admirably accurate" and rests on "solid scientific foundation". It became abundantly clear during cross-examination, however, that the only basis for Dr. Spitz's opinion was his own experience in conducting autopsies and his belief arising from this experience that if stomach contents are readily identifiable at autopsy, then death must have occurred within two hours of the last meal.

[166] Dr. Spitz was unable to cite any recent scientific literature that would support this view. He refused to acknowledge obvious shortcomings in his opinion when these were pointed out to him in cross-examination. He refused to concede that his opinion rested on faulty assumptions and misperceptions of the available primary evidence in this case.

These shortcomings could well explain why the Crown does not ask us to rely on his evidence other than in a few very minor respects. In the result, we have not placed any reliance on his evidence and we give it no further mention.

**(i) Dr. Pollanen**

[167] Dr. Michael Pollanen is the Chief Forensic Pathologist for Ontario. He is also an Associate Professor of Pathology at the University of Toronto and a consulting forensic pathologist at the Ontario Pediatric Forensic Pathology Unit. He has published over fifty papers in the medical literature, and is a member of the U.K. Royal College of Pathologists.

[168] Dr. Pollanen became involved in this case when Crown counsel consulted him and asked for a tutorial regarding stomach emptying and the determination of the time of death. Soon after this consultation, the Attorney General ordered that Lynne Harper's body be exhumed and assigned Dr. Pollanen to perform a re-autopsy on her remains. Dr. Pollanen was also asked to consider all other available forensic evidence in this case. Dr. Pollanen's post-exhumation autopsy report includes both the results of the examination of the remains, which yielded no new evidence, and his assessment of the issues in the case.

[169] In his report and in his testimony before us, Dr. Pollanen described a shift in approach in forensic medicine and in other branches of medicine more generally. Traditionally, expert opinions were largely based on authoritative experience and anecdotal case reports. In the past few decades, and particularly in the last ten years, an

alternative model has developed called the "evidence-based approach". This approach requires a critical analysis of peer-reviewed literature and attention to primary reviewable evidence from the postmortem examination.

[170] Dr. Pollanen stated that there have been numerous developments since 1966 that inform the issue of using stomach contents in estimating time of death. These developments come from the discipline of gastroenterology and involve the use of new monitoring technology to study the stomach-emptying process.

[171] Dr. Pollanen explained that the stomach-emptying process is divided into two phases: the lag phase and the emptying phase. The lag phase is less predictable than the emptying phase and is subject to a wider range of variation in duration, but either or both phases may be prolonged by specific external variables, such as stress, or by intrinsic factors, such as the size and nature of the meal.

[172] According to Dr. Pollanen, in Lynne Harper's case, the volume and appearance of the gastric contents indicate that the ingested material was probably in the lag phase. The mixed nature of her last meal and the relative abundance of solid food imply that the lag phase would likely be longer. The likelihood of a long lag phase and the variability in the length of this phase make a narrow estimate of the time of death scientifically unjustified. Lynne Harper could have been killed at any point during the lag phase, meaning that she could have been killed during the time frame posited by Dr. Penistan. But it is equally true that death could have occurred later.

[173] In Dr. Pollanen's view, asking what the stomach contents reveal about the time of Lynne Harper's death is to pose the wrong question. However, that question was the focal point at the 1966 Reference and is what subsequent experts consulted in this case have been asked to focus on. The right question is how an assessment of all of the evidence in this case helps in ascertaining the time of death.

[174] Dr. Pollanen considered whether additional evidence available in this case – namely, the photographs of the crime scene and the autopsy, the histologic preparations that Dr. Penistan took from the organs and tissues of Lynne Harper, and the known environmental conditions between June 9 and June 11 – support or negate Dr. Penistan's opinion on time of death.

[175] Dr. Pollanen explained that there are three processes whereby a dead body decomposes to the skeleton. The first is autolysis, where the body's digestive enzymes degrade its own tissues. The other two processes are putrefaction and mummification. Putrefaction occurs in a warm, humid environment where bacteria in the intestinal tract produce chemicals that decompose the body. Mummification is a process whereby the body dries out in a hot and dry environment.

[176] In Dr. Pollanen's view, the evidence from the external and internal examination of Lynne Harper's body and the histologic evidence undermine Dr. Penistan's opinion on the time of death. It shows that decompositional changes in the body were less than might reasonably be expected for a postmortem interval of two days, given the prevailing

environmental conditions. According to the available evidence, the environmental conditions on the days in question were hot and damp with temperatures reaching the low thirty degree Celsius range in the daytime and dropping at sunset. Dr. Pollanen testified that these conditions favoured decomposition by putrefaction. He pointed to four indicators of minimal putrefaction in this case.

[177] First, based on the autopsy reports and the photographs of the body at the scene, there is minimal evidence of external putrefaction. Dr. Penistan recorded "nil evidence of putrefaction externally" and the high quality photographs of the body at the scene are consistent with this observation.

[178] Second is the minimal evidence of internal putrefaction. There are no photographs of the inside of Lynne Harper's body. The only reviewable evidence consists of Dr. Penistan's descriptions of the internal organs in his autopsy reports. Based on these descriptions, Dr. Pollanen concluded that "there is no evidence of the usual internal putrefactive changes that are commonly observed after prolonged exposure to a warm environment." For example, Dr. Penistan described the heart muscle as "firm" and "red brown" rather than flabby and pale, the latter being the expected description as the postmortem period advances.

[179] Third, the histologic sections, which are in the form of slides containing tissue samples as prepared by Dr. Penistan during the autopsy, indicate minimal putrefaction. Dr. Penistan took tissue samples from the thymus, lung, liver, kidney, ovaries, uterus,

lower vaginal wall and skin. Dr. Pollanen found there to be no evidence of widespread autolytic or putrefactive change in these samples. He observed that the liver in particular was "remarkably preserved." He concluded that the histology "forms corroborative evidence for a compelling argument of a shorter postmortem interval."

[180] Fourth, there was no scavenging of Lynne Harper's body by animals despite the assumption that it lay exposed in Lawson's Bush for two nights. This factor is of limited significance, however, as Dr. Pollanen acknowledged that it is not known what types of predators were present in Lawson's Bush and the time course of scavenging is not predictable.

[181] Dr. Pollanen expressed his conclusion on the significance of the available evidence as follows:

> The stomach contents suggest a time of death closer to the evening or the night of June 9, 1959; but, the state of the body, histology, and weather suggest a time of death more towards the day or night of June 10, 1959. Thus, different parameters imply different ends of the available temporal window. In providing an expert opinion, one must choose how much weight to place on the competing evidence, thus choosing one end of the available temporal window, or the other. If there is no specific evidential basis to choose which end is more valid, then the choice is reduced to speculation, or the postmortem interval must be estimated as a widely inclusive time frame. The available information, in my view, only supports the latter.
>
> …
>
> In my opinion, there is no merit in forcing a certain conclusion on the time of death, when a balanced analysis of the medical evidence does not clearly corroborate the

> inference made [by Dr. Penistan] based on the stomach contents. Overall, the time of Lynne Harper's death cannot be precisely ascertained from the autopsy findings and it certainly cannot be specified to between 7:00 p.m. and 7:45 p.m. on June 9, 1959.

**(ii) Dr. Knight**

[182] Dr. Bernard Knight is an Emeritus Professor at the University of Wales and has been a fellow of the Royal College of Pathologists since 1976. He was a consultant pathologist to the Home Office in the United Kingdom from 1965 to 1999 and has performed between 25,000 and 30,000 autopsies in his career. He has authored numerous forensic texts, including the leading English textbook, *Knight's Forensic Pathology*, 3rd ed. (London: Arnold Publications, 2004). He is the editor and co-author of *The Estimation of the Time Since Death in the Early Postmortem Period*, 2nd ed. (London: Arnold Publications, 2002). This is the only book in the English language devoted to this subject.

[183] In his testimony before us, Dr. Knight was asked about the evidence-based approach. He explained that this is "a new term for basing all medical treatment, diagnosis including pathology, on a firm experimental basis." He agreed that in the 1960s and before, forensic pathologists tended to rely on their experience in performing autopsies as a basis for their conclusions, "often with very little challenge."

[184] In Dr. Knight's opinion, an estimate of the time of death based on the volume of stomach contents and state of digestion "should never be used as probative evidence"; it

could perhaps be used to direct the police investigation early on, "but you cannot pin it down to any … useful period of time in pinpointing the time of death."

[185] Dr. Knight rejected the use of *rigor mortis* in putting time of death in a limited time frame: "with the distance of a day or two after death it is of no use at all in refining a time of death down to an hour bracket." Decomposition is another highly variable phenomenon: it is possible to have two dead bodies in the same environment with totally different degrees of decomposition.

[186] Dr. Knight also examined the histologic preparations and said that he was "very surprised", knowing the climactic conditions, "that the body was in such a good state because the histology… was almost free from any decomposition." He disagreed with Dr. Penistan's opinion expressed at trial and recorded in his autopsy report that there was autolysis in the fat under the skin of the body: "there certainly was no evidence on the histology I saw."

[187] Dr. Knight made the following observations of the slides:

> Apart from the genital organs, which are always most vulnerable to decomposition because they're moist and they are attacked by flies and whatever, the tissues I saw were almost totally free from decomposition and that seems difficult to reconcile with 45 or 48 hours lying in that temperature which has been recorded.

[188] On the issue of using stomach contents in determining the time of death, Dr. Knight included in his report on the Truscott case what was then a forthcoming chapter on this subject for his book, *The Estimation of the Time Since Death in The Early*

*Postmortem Period.* This chapter discusses the recent literature on the variability of gastric emptying and concludes:

> It may be true that in a proportion – even a majority – of persons, most of an 'average meal' passes from the stomach in something between a half and three hours – but firstly, these persons are not the subjects of a forensic examination, necessitated by a violent crime which may have all the connotations of emotion, fear, injury etc. that is well known to disrupt the digestive process.
>
> Secondly, the 'majority of persons' leaves a very sizeable minority, whose gastric emptying may lie well outside the so-called 'normal' parameters. As proof in a criminal case must be 'beyond reasonable doubt', this leaves little scope for firm testimony based on such shifting sands as gastric physiology.

[189] Before us, Dr. Knight added that since writing the above, he has been made aware of the evidence of the Crown's expert, Dr. Diamant, and recent studies from the field of gastroenterology, which increase the average time he gave for stomach emptying from three to as many as six hours. Dr. Knight testified that it is routine for forensic pathologists to seek information from other disciplines, including gastroenterology, in formulating their opinions.

**(iii) Dr. Diamant**

[190] Dr. Nicholas Diamant has studied, taught, written academic articles and practiced in the discipline of gastroenterology, which deals with disorders of the gastrointestinal tract, for most of his forty-five year career as a doctor. He currently holds the position of Professor in the Faculty of Medicine at the University of Toronto and a staff position at the Toronto Western Hospital in the Division of Gastroenterology.

[191] In his reports and his testimony, Dr. Diamant stated that stomach contents cannot be used to prove a precise time of death. In his words:

> It is not possible to define exact time of death or even time of death within a limited period of time based on an examination of stomach contents. One may say that the state of stomach contents is consistent or compatible with death having occurred within a particular time period. However, the possible time of death cannot be limited to that period on the basis of stomach contents alone….
>
> That being said, information available through stomach contents is not useless or discredited, but it is of limited value and without precision. One can state that death occurred after the meal was eaten. If there are no other complicating factors that would delay emptying, one can make a rough estimate of the time of emptying under "normal circumstances".

[192] In Dr. Diamant's opinion, Dr. Penistan could not use the state of Lynne Harper's stomach contents to limit the time of death to one to two hours after her last meal:

> In the case of Lynne Harper, the state of the stomach contents was compatible with death having occurred one to two hours after she finished her meal, but it cannot be limited to that time period. I base that view primarily on the appearance of the stomach contents as described by the various witnesses, and the degree of acidity in the stomach contents, as described by Dr. Sharpe.

[193] Dr. Diamant criticized the reliance Dr. Penistan placed on the existence of readily identifiable stomach contents in giving his opinion on how long the food had been in the stomach. Foods such as peas, leafy vegetables, corn, and celery are often passed out in the same form in which they are ingested.

[194] Dr. Diamant testified that the volume of contents emptied from Lynne Harper's stomach is also not helpful in determining time of death because it is not known how much Lynne ate or how much, if anything, she had to drink. In addition, her stomach contents would have included gastric secretions of unknown volume.

[195] Dr. Diamant expressed the view that Dr. Penistan was wrong in concluding that because nothing was found in the two to three feet of small bowel he examined, the contents of the stomach therefore reflected the totality of the meal. Food can move from the upper part of the bowel to the colon, which is twenty feet away, in twenty to thirty minutes.

[196] Dr. Diamant testified that the common wisdom had been that most stomachs will usually empty a solid meal in three to four hours. Dr. Brown expressed this opinion at trial. However, modern research shows that, for a number of reasons, the time for a stomach to empty a solid meal can extend to six hours or more. Factors that might cause such variation include: the subject's state of health, age, gender, the size and content of the meal consumed and stress. Recent experimental studies show that after two hours, the stomach is virtually never empty and may retain as much as seventy percent of a meal and as little as ten percent. The stomach of a female child will most likely be at the upper end of any normal range. Recent studies using an endoscope show that meat can remain in the stomach for as long as six hours.

[197] According to Dr. Diamant, more is known now than at trial about the many factors that can affect the way the stomach empties. Studies from the late 1980s and 1990s have examined the effect of various stressors on digestion, such as using sounds to upset people and making people nauseated. These stressors were applied for ten or fifteen minutes and had a delaying effect on digestion that lasted an hour or more. Dr. Diamant is not aware of literature on the effect of repetitive stress over a prolonged period of time, but he felt it makes sense intuitively that if effects are continuously induced, the delay in emptying could be equally prolonged.

[198] Dr. Diamant was asked to comment on Dr. Sharpe's evidence before the Supreme Court on the 1966 Reference that since the stomach contents of Lynne Harper were strongly acidic, they had been there at most one to two hours after eating. Dr. Diamant testified that Dr. Sharpe's inference based on the observed pH levels is incorrect because once the contents become highly acidic, which takes 90 to 120 minutes, the acidity level in the stomach remains high until the person eats again. Therefore, the acidity level cannot establish the maximum period the meal was in the stomach, but rather determines the minimum period.

[199] Finally, Dr. Diamant testified that under normal circumstances free of factors known to delay digestion, if it is assumed there were 300 millilitres of food in Lynne

Harper's stomach,[12] this would be consistent with death four hours after eating. Had she experienced psychological stress or fear in the period before her death, her digestion may have been delayed for an unknown duration.

**Admissibility of the Expert Evidence on Time of Death**

[200] The Crown argues against the admissibility of the expert evidence relevant to the time of Lynne Harper's death in two ways. First, the Crown contends that the evidence is not "fresh" in that it duplicates and in some cases emphasizes evidence that was before the jury or before the Supreme Court on the first Reference. Second, the Crown argues that to the extent that any of the expert evidence heard in this court is indeed "fresh", that evidence could not reasonably be expected to affect the jury's assessment of the time when Lynne Harper died.

[201] We reject the Crown's argument that the evidence of Drs. Pollanen, Knight and Diamant is essentially the same evidence that was before the jury and the Supreme Court. Admittedly, all of the experts in the various proceedings have testified about the same issues: whether stomach contents and the extent of decomposition and *rigor mortis* can properly be used to put the time of death within a narrow time frame. However, the

[12] It is not clear from the record whether this volume was actually the amount that was in Lynne's stomach after her death. At trial, Dr. Penistan described the stomach as distended by one pint of a meal (568 ml), which is more than the 300 ml that Dr. Diamant was asked to consider. The exhibit jar containing the stomach contents measured less than half a pint according to Mr. Funk, the biologist at the Attorney General's laboratory who received the jar on June 12, 1959 from Corporal Sayeau, a member of the O.P.P. assigned to the investigation. Some of the "missing contents" were accounted for by Dr. Sharpe of the AG's lab, who removed 50 or 60 cubic centimetres for his own chemical analysis. But this did not account for the difference between the one pint referred to by Dr. Penistan and the quantity remaining in the sample jar as recorded by Mr. Funk.

experts in the present proceedings have brought significant new considerations to bear on these issues.

[202] With regard to the use of stomach contents, at the time of the trial and the 1966 Reference, research into the timing of the stomach-emptying process was in its infancy and, in some cases, yielded results that we now know to be unreliable. Dr. Diamant's view, which is shared by Drs. Pollanen and Knight, is that there is no comparison between the current body of knowledge regarding the science of gastric emptying and what was known in 1959 and 1966. Dr. Diamant explained:

> Since 1966 and with the advent of new technologies for assessing gastric emptying, there has been a clear definition of the timing and nature of gastric emptying and there are now large studies that have provided reliable information on the broad range of emptying times in normal subjects. Factors such as gender, age, the type and size of meal, disease states, and the effects of certain types of stress are now documented in the literature. The technical problems associated with various methods for gastric emptying have also been established. This is all virtually new information since 1966.

[203] Recent experimental work establishes a much broader time range for the normal gastric-emptying process than what any of the experts testified to in the prior proceedings. We now know that the normal time in which a stomach will empty a solid meal can extend to six hours or even more. Moreover, scientific studies have demonstrated that external factors such as physiological stressors delay digestion. Dr. Diamant acknowledged the plausibility of the theory that fear could have suspended

Lynne Harper's digestion for many hours beyond the normal range of time that it takes for the stomach to empty.

[204] Drs. Pollanen, Diamant and Knight gave opinions supported by recent scientific research that the broader time range for normal gastric emptying coupled with the many variable factors that affect the digestive process make it impossible to use stomach contents to determine time of death within a narrow window. Their evidence thus resolves the debate on this issue as it played out in the Supreme Court of Canada.

[205] We agree with Crown counsel that the Supreme Court on the first Reference heard some evidence about the minimal external *indicia* of decomposition of Lynne Harper's body and that this suggested a shorter postmortem interval. The majority of the court did not refer to this testimony in its reasons.

[206] The fresh evidence relating to decomposition, however, goes beyond that heard at the first Reference. The evidence addresses not only external evidence of decomposition, but also refers in some detail to the state of internal decomposition. Drs. Pollanen and Knight are the first experts to give evidence about the significance of the histologic slides as independent indicators of the degree of postmortem changes. Neither Dr. Pollanen nor Dr. Knight saw any evidence of widespread autolytic or putrefactive changes in the tissue samples removed from the body. Both found the absence of any such indicators surprising given the hot, humid weather conditions between the time of Lynne's disappearance and the discovery of her body.

[207] Combining both the external and internal evidence of decomposition reveals that there is no evidence from the autopsy to corroborate Dr. Penistan's narrow window for the time of death as prior to 7:45 p.m. on June 9. To the contrary, the minimal evidence of autolysis and putrefaction suggest a shorter interval between her death and the discovery of her body. Contrary to Dr. Penistan's opinion, the state of decomposition of the body is not "entirely compatible" with the death of Lynne Harper prior to 7:45 p.m. on June 9, but instead points to a time of death more towards the day or night of June 10.

[208] For these reasons, we are satisfied that the state of the expert evidence relevant to the time of Lynne Harper's death is significantly different now than it was at trial and at the first Reference. It remains to be explained why those differences are sufficient to require that the conviction be quashed.

[209] The time that Lynne Harper met her death was crucial to the Crown's case at trial. It was against the backdrop of Dr. Penistan's opinion that the Crown went on to review the morass of testimony from the County Road witnesses about who saw or did not see whom, when and where. The clearest way through the conflicting County Road evidence led by the Crown and the defence was to filter it through Dr. Penistan's opinion on the time of death: if Lynne Harper was dead by 7:45 p.m., then only the appellant could have killed her, regardless of the testimony of the children who swore they saw him north of the tractor trail with Lynne on his bicycle that evening.

[210] As Mr. Martin put it in his oral argument to the Supreme Court on the 1966 Reference, "[b]y the medical evidence the Crown sought to convert what was pure evidence of opportunity to commit the crime into one of exclusive opportunity to commit the crime." Based on the medical evidence of exclusive opportunity, the previous adjudicative bodies that heard this case may have been led to conclude that the appellant had to be the person who killed Lynne Harper.

[211] The fresh evidence tendered in these proceedings on the issue of the time of Lynne Harper's death establishes that Dr. Penistan's evidence providing a forty-five minute window for the time of death must be rejected as scientifically unsupportable. Similarly, the state of decomposition of Lynne Harper's body can no longer be said to provide independent support for the conclusion that she was dead by 7:45 p.m. on June 9.

[212] The Crown next contends that the fresh evidence at its highest only moves the possible window on the time of death two hours later on June 9. Crown counsel submit that if this is the impact of the fresh evidence, it cannot reasonably be expected to have any effect on the verdict. The Crown relies on the appellant's acknowledgement that it is very unlikely that someone would have abducted Lynne Harper and returned to Lawson's Bush to rape and murder her before dark on June 9. Assuming Lynne was killed before

10 p.m., the appellant's theory of what happened to her makes sense only if she had been returned to Lawson's Bush and was murdered there some time after dark on June 9.[13]

[213] We do not accept the Crown's position that if the fresh evidence moves the possible window on the time of death only one or two hours later than 7:45 p.m., then this could not reasonably have affected the jury's verdict. It bears repeating that on the Crown's theory as presented at trial, if the appellant did not murder Lynne before he returned to the school grounds (on the Crown's submissions, no later than 8:15 p.m.), then he was not the perpetrator.

[214] Moreover, we do not accept that the fresh evidence on the use of stomach contents in estimating time of death only moves the possible window on the time of death to within three or four hours of Lynne's last meal. Although the fresh evidence on this issue does not eliminate the possibility that Lynne Harper was dead before sunset on June 9, it does establish that she could have died hours later than this. Dr. Diamant testified that even in normal circumstances, the stomach may take six hours or more to empty and that psychological factors can delay this period for an unknown but significant duration. If Lynne were held captive by an abductor, the terror of this experience could well have delayed her digestive process for hours beyond the normal range. Furthermore, Dr. Diamant emphasized that it is not possible to limit time of death to a particular time period based on stomach contents alone. The Crown did not offer any credible evidence

[13] At the first Reference, appellant's counsel took the position that Lynne died elsewhere and that her body was discarded in Lawson's Bush. On this Reference, the appellant accepts that the "best inference" is that the actual murder occurred in Lawson's Bush.

to challenge Dr. Diamant's assessment. Indeed, Dr. Diamant was the Crown's own witness.

[215] In conclusion, the expert evidence pertaining to the time of Lynne Harper's death meets the criteria for the admissibility of fresh evidence. The fresh expert evidence of Drs. Pollanen, Knight and Diamant demonstrates that there is no scientific justification for Dr. Penistan's opinion that Lynne Harper must have died between 7 and 7:45 p.m. on June 9. This evidence also undermines the Supreme Court's conclusion that Dr. Penistan's opinion was sound. We are satisfied that the fresh expert evidence, considered cumulatively and in the context of the other expert evidence heard at trial and on the first Reference, could reasonably be expected to have affected the result of the prior proceedings.

**Archival Material Relating to the Credibility and Reliability of Dr. Penistan's Evidence as to the Time of Death**

[216] In addition to the fresh expert evidence, the appellant also tendered as fresh evidence certain archival documents relating to the reliability of Dr. Penistan's evidence concerning the time of death. These documents, which have not been previously considered in a judicial forum, include two versions of Dr. Penistan's autopsy report that differ from the version ultimately filed with the Coroner's Office. We refer to these two documents as the unofficial or preliminary versions of Dr. Penistan's autopsy report. The appellant also relies on a memorandum prepared by Dr. Penistan in 1966 at Crown

counsel's request in preparation for the first Reference. That memorandum has come to be known as the "agonizing reappraisal".

[217] The appellant also seeks to rely on other documents relating to pathology that were not considered in previous judicial proceedings, including memoranda that Drs. Simpson and Sharpe prepared for the Crown in 1966 and an internal Federal Department of Justice memorandum describing forensic consultations conducted in early 1966. These other documents do not add to the evidence of the frailties of Dr. Penistan's opinion canvassed in the previous section and for that reason we do not consider them. We focus instead on the two unofficial versions of Dr. Penistan's autopsy report and his 1966 "agonizing reappraisal", in which he reviewed his pathological findings.

**(i) The unofficial versions of Dr. Penistan's autopsy report**

[218] We have already described Dr. Penistan's official, undated, typewritten autopsy report. This report was not made an exhibit at trial and there was no reference to an official autopsy report at either the preliminary inquiry or the trial. The report was filed with the Provincial Coroner's office in September 1963. It was prepared on a pre-printed form containing headings such as "*Rigor Mortis*", "Decomposition", and "External Marks of Violence". The content of the official report adheres closely to Dr. Penistan's trial testimony and the appellant does not contend that it constitutes fresh evidence. The appellant relies on the two other versions of the autopsy report.

[219] The first such version was obtained in 2005 from the Stratford General Hospital. It is unsigned, undated and in the handwriting of two different people. It was written on

the same pre-printed form as the official version. In all likelihood, this version was prepared during the autopsy. All but the first ten lines were written by Dr. Brooks, who appears to have taken notes as dictated to him by Dr. Penistan during the autopsy. The first ten lines of the report, which express an opinion on the time of death, are in Dr. Penistan's handwriting.[14]

[220] Notably, this report states that identification of the body at 4:45 p.m. on June 11 took place "about 40 hours after death". This estimate would place Lynne Harper's death at about 12:45 a.m. on the morning of June 10, a time that is irreconcilable with the Crown's theory of the case against the appellant and when the appellant had an unchallenged alibi.

[221] This report describes the stomach contents as follows:

> Approx 1 pint recently ingested food – largely undigested – including veg. matter but no obvious meat. [Underlining in original.]

[222] The other unofficial version of the autopsy report is a combination of handwriting and typing on the same standard form as the other two reports. This document was found in Dr. Penistan's personal files during Mr. Kaufman's investigation in 2002 and was forwarded to the parties. Its critical feature is the estimated time of death: 30-36 hours before the 4:45 p.m. identification of the body on June 11, which would place the time of death between 4:45 a.m. and 10:45 a.m. on the morning of June 10.

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[14] The Crown did not dispute his authorship of these ten lines.

[223] While most of the information required by the form is filled in with typed answers, the page recording microscopic findings is entirely in Dr. Penistan's handwriting. The inference is that this version of the report was created after the handwritten report prepared on the night of June 11 and before Dr. Penistan finalized his microscopic findings.

[224] This report describes the stomach contents as follows:

> Stomach unremarkable. Content of approximately 1 pint of poorly masticated, only slightly digested food, including peas, onion, corn, and a few shreds of apparent meat.

**(ii) Dr. Penistan's "agonizing reappraisal"**

[225] In 1966, prior to the first Reference, the Crown commissioned Dr. Penistan to provide a review of his pathological findings at the autopsy. His resulting report, entitled *Regina v. Truscott: Autopsy on the body of Lynne Harper -- A review of the pathological findings*, was dated May 1966 and marked "Draft". He sent the report with an accompanying letter dated May 19, 1966 to Inspector Graham, who was the lead O.P.P. investigator into Lynne Harper's murder. In this letter, Dr. Penistan described the report as a clarification of his earlier work:

> In the review I have tried to clarify the facts as set out in the PM [postmortem] report on Lynne HARPER and the transcripts and to restate the conclusions drawn from them and expressed in the same places. *I do not believe I have changed any of my essential conclusions as a result of my review (one is tempted to refer to it as an "agonizing reappraisal" in the current jargon: the adjective is probably better justified here than in most cases)* but I must depend on

> someone else to assess whether there has been any significant change in the expression of these views. Your detailed knowledge of the transcript will enable you to do this better than most. [Emphasis added.]

[226] In his report, Dr. Penistan said the following about decomposition and *rigor mortis*:

> The state of decomposition in Lynne's body is considered fully compatible with death about 48 hours prior to autopsy, but it is not incompatible with death a day previously or a day later.
>
> *Rigor* was still present to a slight degree. Smith and Fiddes state that *rigor* "begins to pass off in about 36 hours in summer" and that it is of value up to the 2nd or 3rd day. (See also Glaister). The finding is thus compatible with death about 48 hours previously, and compatible also with death some hours later than that. In evidence it was stated only that the degree of decomposition and rigor were <u>compatible</u> with death "some two days previously" and this was confirmed in cross-examination. [Underlining in original; citations omitted.]

[227] On the subject of stomach contents, Dr. Penistan discussed the issue of the volume of the contents. He acknowledged that there was a discrepancy between his trial evidence that the stomach was distended by one pint and the report of Mr. Funk that the volume of contents he received was about "250 [cubic centimetres]" [*i.e.*, less than half a pint]. He posited that one could assume that some of the contents were uncollected and thus it would "seem reasonable to accept that the volume of food present lay somewhere between ½ and 1 pint."

[228] Dr. Penistan wrote the following about his descriptions of the nature of the stomach contents:

> A note was made by the amanuensis [Dr. Brooks, the note taker during the autopsy] that the content included vegetable matter with no obvious meat in order to avoid an unjustifiably dogmatic statement that meat was in fact present when further examination was required to establish this with certainty. The wording was felt to be itself potentially misleading and was revised in the autopsy report to 'apparent meat' – *i.e.* which looked like meat but which required further examination for final identification. In evidence the details of the food were accordingly given with reservations. [Underlining in original; citations omitted.]

This statement includes a significant discrepancy with Dr. Brooks' notes, which state: "no obvious meat."

[229] Dr. Penistan made three points about his findings on time of death:

> 1) All findings are compatible with death within 2 hours of Lynne's last meal. However –
>
> 2) The degrees of *rigor* and decomposition are also compatible with death at a later time.
>
> 3) The state of the stomach content is also compatible with death at a later hour provided that digestion and emptying were delayed by some physical or psychological episode occurring within approximately 2 hours of the last meal.

[230] Dr. Penistan's ultimate conclusion on time of death in this report was as follows:

> All findings are compatible with death within 2 hours of Lynne's last meal. They are not incompatible with death at a later time (up to 12 hours or even longer).

**Admissibility of the Archival Material Relating to the Credibility and Reliability of Dr. Penistan's Evidence**

[231] The appellant argues that the three documents described above could have been used to successfully impeach the reliability of Dr. Penistan's opinion concerning the time of Lynne Harper's death, if not his overall credibility as a Crown witness. The documents would clearly be admissible for impeachment purposes. We agree with the appellant's contention that the documents could have had a dramatic impact on the jury's assessment of Dr. Penistan's evidence.

[232] Armed with the two unofficial and earlier versions of the autopsy report, the defence may have secured an admission by Dr. Penistan that he had changed his mind as to the likely time of Lynne Harper's death. That admission would cry out for an explanation for the change. We cannot think of one that would help Dr. Penistan's credibility.

[233] Even without that admission, the defence could have established that Dr. Penistan's opinion had ranged from an initial assessment placing the time of death at 12:45 a.m. on June 10, to a second estimate placing the time of death at least some four hours later on June 10, and finally, to a third opinion placing the time of death at between 7:15 and 7:45 p.m. on June 9, several hours earlier than either of his prior estimates. Absent some plausible explanation for these variations, it seems unlikely that Dr. Penistan's opinion could be accepted as reliable by a reasonable trier of fact. Indeed, the nature of the changes in his opinion leaves Dr. Penistan's evidence reasonably open to

the allegation that his opinion shifted to coincide with the Crown's case against the appellant.

[234] The "agonizing reappraisal" contradicts, or at least casts doubts on various specific assertions that he made at trial. For example, the "agonizing reappraisal" suggests an evolution in Dr. Penistan's description of his observations of the stomach contents. That evolution is consistent with the appellant's contention that Dr. Penistan sought to make his evidence consistent with the Crown's theory on the time of death.

[235] More significantly, however, the tone of the "agonizing reappraisal" is very different from the tone of Dr. Penistan's trial testimony. Gone is Dr. Penistan's confident and definitive opinion that Lynne Harper died between 7:00 and 7:45 p.m. on June 9. In the "agonizing reappraisal", Dr. Penistan advanced a much more cautious and circumspect opinion. By the time he wrote this document, Dr. Penistan's opinion came down to this – the evidence is compatible with Lynne Harper dying within two hours of her last meal, but is not incompatible with Lynne Harper dying more than two hours after her last meal. In other words, his opinion by 1966 was that the stomach contents and the other postmortem changes do not assist in placing the time of death before or after 7:45 p.m. The tone of Dr. Penistan's "agonizing reappraisal" is much closer to the defence position advanced at trial and on the first Reference than to the opinion he gave at trial.

[236] The "agonizing reappraisal" could also have been used by the defence to challenge Dr. Penistan's trial evidence that the state of decomposition of Lynne Harper's body was

"entirely compatible with death two days previously". It could have been put to Dr. Penistan that in fact it was his opinion, as expressed in the "agonizing reappraisal", that the state of decomposition was "not incompatible with death a day previously or a day later". In other words, the stage of decomposition did not help determine whether Lynne Harper was dead by 7:45 p.m. on June 9.

[237] Similarly, Dr. Penistan's observations in his "agonizing reappraisal" concerning the passage of *rigor mortis* could have been used to challenge his trial evidence that the degree of *rigor mortis* independently supported his estimate that Lynne Harper died between 7:00 and 7:45 p.m. Just as with the decomposition, the "agonizing reappraisal" could have been used by the defence to elicit an admission from Dr. Penistan that his observations of *rigor mortis* were compatible with death occurring hours after 7:45 p.m. on June 9.

[238] Evidence that would have permitted the defence to challenge Dr. Penistan's trial evidence on the state of the body is highly significant because the Supreme Court of Canada determined, as the Crown had argued, that special deference should be paid to Dr. Penistan's opinion as the pathologist who examined Lynne Harper's body. Had the defence known of the information contained in the "agonizing reappraisal", it could have effectively shown that Dr. Penistan's supplementary observations of decomposition and *rigor mortis* were entirely compatible with death at a time that exculpated the appellant.

[239] It is unnecessary to come to any definitive conclusion as to why Dr. Penistan changed his opinion concerning the time of death in the three autopsy reports he prepared. It is also unnecessary to determine his motivation some seven years later for revising the tenor of his opinion while insisting that he was not in any way altering that opinion. What is important, however, is the potential impact of these documents on the evidence Dr. Penistan gave at trial.

[240] Had these documents been available for cross-examining Dr. Penistan, counsel may well have moved Dr. Penistan to qualify or retract his definitive opinion on the time of death. We note in this regard that it is accepted that Dr. Penistan prepared, at least in part, the two unofficial versions of the autopsy report.

[241] Even if the attempt to move Dr. Penistan off his firm opinion on the time of death failed, these documents may well have led a reasonable jury to conclude that Dr. Penistan's opinion as to the time of death could not be accepted. The contention that Lynne Harper died before 8:00 p.m. was essential to the Crown's case and Dr. Penistan's opinion that she died between 7:00 and 7:45 p.m. was the critical piece of the Crown's evidence on that issue. Had Dr. Penistan's opinion been effectively neutralized by cross-examination based on these documents, the Crown may well have failed to satisfy the jury that Lynne Harper died before 8:00 p.m. Similarly, had these documents been placed before the Supreme Court on the Reference, thereby undermining Dr. Penistan's credibility, the majority may well have decided not to act on his evidence. The

documents are sufficiently cogent to merit admissibility as fresh evidence under the cogency criteria that we must apply on the Reference.

[242] This leaves only the question of whether the due diligence criterion should operate to exclude the admissibility of these documents even though they are sufficiently cogent to justify their admission as fresh evidence on appeal. There is no evidence that the appellant's counsel were shown any of these documents. Nor is there any evidence that the documents were deliberately hidden from the defence. Indeed, it would appear that Dr. Penistan may well have referred to one of the versions of his autopsy report while testifying: see *supra* at para. 137.

[243] Whatever may be said about what the defence knew or reasonably could have known about these documents, we would not exclude them because of a failure to exercise due diligence in 1959 or 1966 for two reasons. First, it cannot be said that a failure to pursue these documents somehow reflected a tactical decision made by counsel for the appellant in 1959 or 1966. Second, and most important, the evidence is sufficiently cogent to overcome any possible failure to exercise due diligence, particularly in the context of this Reference, where the Minister of Justice has directed the court to determine whether the fresh evidence reveals a miscarriage of justice.

[244] To summarize, the expert evidence heard in this court relating to the time of death and the documents authored by Dr. Penistan meet the criteria for the admissibility of fresh evidence on appeal. The "interests of justice" are best served by admitting that

material as fresh evidence. When this new evidence is placed in the context of the evidence at trial and the evidence heard on the first Reference, we are satisfied that the evidence is sufficiently probative that it could reasonably be expected to have caused the jury to at least have a reasonable doubt that Lynne Harper died before 8:00 p.m. If the jury concluded that she died after 8:00 p.m., or even if the jury had a reasonable doubt on that factual issue, it could not have convicted the appellant. The result of the prior proceedings could reasonably be expected to have been different had this evidence been available to the jury or to the Supreme Court on the first Reference.

[245] A determination that fresh evidence should be received on appeal because it could reasonably be expected to have affected the verdict means that the verdict can no longer stand. Using the language of the relevant provision in Part XXI of the *Code*, the conviction, placed in the light of the fresh evidence, constitutes a miscarriage of justice and must be quashed. We turn next to the second stage of our analysis: having quashed the conviction, what is the appropriate remedy?

## PART IV – THE COURT'S APPROACH TO REMEDY

[246] Where a conviction is quashed on appeal, s. 686(2) of the *Criminal Code* provides two possible remedies: the appeal court may either order an acquittal or a new trial. If the court orders a new trial, the residual power in s. 686(8) permits it to also order a stay of that new trial. A stay is ordered in situations where a new trial, although warranted on the evidence, would be manifestly unfair to the appellant.

[247] Relatively little has been written about the principles guiding the exercise of the remedial discretion in s. 686(2). It is clear that if the appeal court is satisfied based on the trial record as augmented by the fresh evidence, that no reasonable jury could convict, the appeal court's discretion must be exercised in favour of ordering an acquittal. An acquittal is the only appropriate order in this circumstance since a conviction following a retrial would presumably be quashed as an unreasonable verdict. An appeal court will not order a new trial to give the Crown an opportunity to make a case against an appellant when, as matters stood at the end of the proceedings in the court of appeal, no reasonable jury could convict.

[248] Apart from those cases where an acquittal is mandatory, the manner in which an appeal court should exercise its remedial discretion is more uncertain. As a general rule, if the appeal court is satisfied that the entirety of the record at the end of the appeal admits of a reasonable possibility of a conviction on a retrial, the appeal court will order a new trial.

[249] There are, however, cases where an appeal court has entered an acquittal even in the face of evidence that could reasonably support a conviction on a retrial. For example, acquittals have been entered where an appellant has fully served his or her sentence, or has already been subjected to several trials. These authorities offer little guidance as to when an acquittal should be entered as opposed to ordering a new trial with a direction that the trial be stayed.

[250] The appellant in this case served ten years in the penitentiary and has lived his entire adult life in the shadow of a conviction that we have concluded must be quashed as a miscarriage of justice. These circumstances could, on some of the authorities alluded to above, justify an acquittal even if the appellant could be convicted on a retrial.

[251] Counsel for the appellant, however, do not seek an acquittal primarily on that basis. They argue for an acquittal based on the factual merits of the case as it now stands. They submit that the evidence demonstrates that if a new trial were to be held, an acquittal would be the only reasonable result. Indeed, counsel go a step further and argue that on the entirety of the record, the appellant has established that he did not kill Lynne Harper. Counsel urge the court not only to exercise its discretion and acquit the appellant, but to declare him innocent.

[252] Counsel for the appellant acknowledge that a declaration of innocence has no statutory basis in Part XXI of the *Criminal Code.* They accept that it would be most extraordinary for an appeal court to make a finding of factual innocence. Indeed, counsel have not pointed to any instance in which a Canadian appellate court has ever made such a declaration. Counsel submit, however, that criminal courts in the United Kingdom have from time to time, where justice demands it, pronounced an accused to be factually innocent, if the evidence justifies that declaration: see for example *R. v. Fell*, [2001] EWCA Crim 696 (C.A.). They argue that the miscarriage of justice occasioned to the appellant can only be properly redressed by a declaration of his innocence.

[253] The Crown submits that an acquittal under s. 686(2) is the appropriate remedy only if on the totality of the evidence no reasonable jury properly instructed could convict. On the Crown's submissions, this court should ask only whether the evidence is such that a conviction remains a reasonable possibility. If the entirety of the evidence could reasonably support a conviction, then, the Crown submits that this court should not attempt to assess the likelihood of a conviction or an acquittal, but instead should order a new trial. The Crown maintains that an acquittal in the face of an evidentiary record that could reasonably support a conviction is a misleading result that does a disservice to the due administration of justice.

[254] The Crown acknowledges that because of the lengthy passage of time, were this court to order a new trial, a new trial would not be possible. The physical evidence adduced at trial has since been destroyed. Some of the key witnesses are now deceased or are otherwise no longer capable of giving evidence. For those who remain, their memories of the relevant events have understandably faded after almost fifty years.

[255] The Crown maintains, however, that the inability to hold a new trial is irrelevant to the manner in which this court should exercise its remedial powers. The Crown argues that this court exhausts its responsibilities with respect to the future course of this case if it determines that there is an evidentiary basis upon which the appellant could be convicted. On this argument, the inability to retry the appellant because of the passage of time does not justify acquitting him.

[256] The Crown invokes the well-recognized divided responsibility of the court and the Attorney General for Ontario on matters pertaining to the administration of criminal justice. The court's function is to assess the evidence and decide whether a conviction remains a reasonable possibility on a retrial. If it is, submits the Crown, then any decision as to the conduct of future proceedings is for the Attorney General and not the court.

[257] On the Crown's approach, if the court determines that a conviction is a reasonable possibility on a retrial, then it must order a retrial. The Attorney General then has three options: stay the charge, withdraw the charge, or have the appellant arraigned before the trial court and offer no evidence against him. If the Attorney General were to choose the last option, the appellant would have his acquittal. On either of the other two options, there would be no final verdict in this case. The Crown has advised the court that it cannot commit to any of these possible options until it has the opportunity to consider the court's judgment on the Reference.

[258] There is some merit in the Crown's submissions. We accept that in the normal course when an appeal court is considering whether to enter an acquittal or order a new trial after it has quashed a conviction based on fresh evidence, the court should limit its assessment in the manner urged by the Crown. In a routine appeal, if a conviction would be a reasonable verdict on a retrial, the court should remit the matter to the trial court for that retrial.

[259] This approach is not, however, appropriate in all circumstances. Some cases fall outside of the norm. The remedial discretion in s. 686(2) is sufficiently broad to permit resort to a more vigorous review of the evidentiary record in those cases where that approach is required by the interests of justice. For example, in deciding how to exercise our remedial discretion, we think it is significant that no new trial can ever be held in this case. The inability to retry the appellant may justify a more aggressive review of the factual record by this court than would be necessary if the matter could be put to a new jury on a retrial.

[260] This case is far from a routine appeal. There are several features of these proceedings that must be taken into account in deciding the appropriate remedy:

- the fresh evidence satisfies us that the appellant's conviction in 1959 and the affirmation of that conviction on the first Reference in 1966 constitute a miscarriage of justice;

- the appellant - who has maintained his innocence since the night Lynne Harper disappeared - and his family have lived under the burden of this miscarriage of justice for almost fifty years;

- the fresh evidence has significantly weakened the Crown's case against the appellant;

- this court is the first judicial body to have before it a substantial amount of material that could have assisted counsel in making full answer and defence on the appellant's behalf at his trial and at the first Reference; and

- while acknowledging the deficiencies of the appellate forum insofar as fact finding is concerned, there will never be another forum in a better position to make an assessment of the appellant's culpability based on a complete record.

[261] As indicated above, counsel for the appellant argue for an acquittal and a declaration of innocence. In the event, however, that the court were to determine that there remains a basis on which a jury could convict the appellant, counsel eloquently argue that it would be a hollow victory if this court were to quash the conviction as a miscarriage of justice and order a new trial knowing that a new trial will never take place. Counsel submit that if the court were to follow this course, and depending on the decision of the Attorney General, the appellant, an acknowledged victim of a miscarriage of justice, would be left in a limbo-like state where his culpability for Lynne Harper's murder would remain unresolved in the eyes of the law.

[262] Counsel for the appellant submit that if there remains some basis for a conviction, this court should assess the chances of a conviction or an acquittal if a new trial were to be held. Counsel contend that, as it now stands, the Crown's case, if it is alive at all, is barely breathing while the appellant's defence has become stronger and stronger as new material comes to light.

[263] In the circumstances of this Reference, we are satisfied that the interests of justice demand that we take a hard look at the entire evidentiary record before determining how we should exercise our remedial discretion.

[264] The appellant has not demonstrated his factual innocence. To do so would be a most daunting task absent definitive forensic evidence such as DNA. Despite the appellant's best efforts, that kind of evidence is not available. The task of demonstrating innocence is particularly difficult in this case where in addition to the passage of almost a half-century since the crime, certain immutable facts cast some suspicion on the appellant. He was the last known person to see the victim alive and was with her at a location very close to where she was murdered. At this time, and on the totality of the record, we are in no position to make a declaration of innocence. Indeed, we are not satisfied that an acquittal would be the only reasonable verdict. In the final section of Part V of these reasons, we describe what remains of the Crown's case (see Section E, *infra*).

[265] This is one of those cases where a new trial could result in an acquittal or a conviction. In most cases, that conclusion would lead to an order for a new trial. However, to order a new trial in these circumstances merely because the remaining evidence clears a relatively low evidentiary threshold, knowing full well that a new trial will never be held, would be unfair to the appellant and does a disservice to the public. Nor would an order for a new trial accompanied by a further order staying the new trial be an adequate remedy. It would remove the stigma of the appellant's conviction, but

leave in place the stigma that would accompany being the subject of an unresolved allegation of a crime as serious as this one.

[266] The appellant, through no fault of his own, will never have the opportunity to stand before a jury of his peers and make full answer and defence to the allegation that he murdered Lynne Harper. He will never have his guilt determined by a jury who knows what this court now knows. For example, the appellant cannot put before a jury the evidence heard by this court that destroys the damning evidence the jury heard in 1959 concerning the narrow window of time during which Lynne Harper's murder must have occurred. Similarly, the appellant will never have a chance, armed with all of the archival witness statements before this court that we discuss in Part V of our reasons, to challenge the Crown's County Road evidence or to buttress the defence version of that evidence. Fairness to the appellant dictates that this court should, to the extent that it can within the institutional limits of appellate review, endeavour to bring this matter to a conclusive end.

[267] The integrity of the criminal justice system would also be served by bringing finality to this long-running case. The public uncertainty as to the validity of the appellant's conviction, reflected in the Minister's decision to order the Reference, deserves, if possible, a more definitive answer than an order for a new trial knowing that a new trial will never be held.

[268] In the unique circumstances here, we take the following approach in exercising our remedial discretion. While acknowledging the limitations imposed by the appellate forum, the passage of time, and the numerous factual questions that will never be fully answered, we approach the determination of the appropriate remedy by envisioning how a hypothetical new trial of the appellant would proceed in light of the entirety of the information that is now before us. In our view, the appellant should be entitled to an acquittal if we conclude, based on all of the information now available, that it is clearly more probable than not that the appellant would be acquitted at a hypothetical new trial.

[269] We are satisfied that the appellant has met that standard.

[270] In concluding that an acquittal is clearly the more probable result of a hypothetical new trial, we have regard to the evidence adduced at trial and on the first Reference. We also consider the evidence we have admitted as fresh evidence in these proceedings. In addition, we take into account the mass of material relied on by counsel for the appellant that has not been previously considered in a judicial forum. This material includes information from a wide variety of sources, including archival documents and testimony heard by this court from numerous witnesses. Some of the material would be potentially admissible for the truth. Some of the material could be used for more limited purposes, for example, to challenge Crown witnesses in cross-examination. We are able to consider this material in exercising our remedial discretion without first having to be satisfied that the material would meet the relevant test for admitting fresh evidence on appeal.

[271] Without speculating, it is possible to safely predict some of the things that could occur at a hypothetical new trial if counsel could test the existing evidence armed with all of the material now available. For example, the jury would know that a forensic examination of Lynne Harper's stomach contents could not be used to fix the time of death as before or after 8:00 p.m. on June 9. The jury would have before it a mass of expert evidence demonstrating that the narrow time frame described by Dr. Penistan and the virtually exclusive opportunity it gave the appellant to commit the murder cannot withstand scientific scrutiny. The jury would also have before it entomology evidence that could raise a reasonable doubt that Lynne Harper's death occurred before darkness on June 9.

[272] The jury would also have a very strong reason to reject the testimony of a key Crown witness, Arnold George. The Crown at trial heavily relied on thirteen-year-old George's testimony to the effect that the appellant asked George to lie for him and say that he had seen the appellant at the river on June 9 as post-offence conduct indicative of the appellant's guilt. George's evidence was not supported by any other testimony. In light of the information now available, it is unlikely that a jury would rely on George's evidence, particularly in areas where it was not supported by any other evidence.

[273] The jury would also know that in the view of several medical experts, the lesions on the appellant's penis were not caused by an act of sexual intercourse with a young girl. While it is possible that a pre-existing skin condition could have been aggravated by a

sexual assault, it is equally, if not more possible, that the lesions were the result of a number of other possible innocent causes.

[274] In other material respects, we are unable to say with any degree of certainty exactly how a hypothetical new trial would unfold. Even in these areas of uncertainty, however, it can safely be said that the defence would be able to subject the Crown's case to much stronger scrutiny than it did in either 1959 or 1966. Similarly, the defence would have access to some potentially exculpatory evidence that it did not have in either of the prior proceedings.

[275] The County Road evidence provides an excellent example. While it is impossible to fix on one reasonable version of that evidence to the exclusion of all other versions, the archival material discovered by the appellant's counsel, combined with the other available material, would permit a formidable challenge to the Crown's theory as it relates to the County Road evidence. An alternative version of that evidence which places the appellant on the County Road at a later time than argued by the Crown, and which thereby neutralizes the Crown's County Road evidence, could be constructed from this material. Even if the Crown's version of the County Road evidence remains a plausible one, there are certainly other plausible versions that could support the defence position.

[276] In the remainder of these reasons, we examine how the information that is now before this court could be used at a hypothetical new trial of the appellant to weaken the Crown's case and to strengthen the defence position. We engage in this exercise to

demonstrate that while a conviction is still a possibility, an acquittal is clearly the more probable result.

## PART V – A HYPOTHETICAL NEW TRIAL

[277] As we have said, in our consideration of what a hypothetical new trial of the appellant would look like, we assume that the evidentiary record includes the evidence presented by the Crown and the defence at trial and on the first Reference. We supplement that record with the fresh evidence we have received relevant to the time of Lynne Harper's death. We then examine the remainder of the new material placed before us and consider how it could reasonably be expected to affect the respective cases of the Crown and the defence at a hypothetical new trial. That effect could be direct, such as by way of adding evidence relevant to a fact in issue, by changing existing evidence, by challenging the credibility of a witness, or by challenging the reliability of a piece of evidence. The effect could also be indirect, such as by pointing to new avenues of investigation that would be available to the defence.

[278] We appreciate that the exercise we engage in could well be characterized as artificial and speculative. No one will ever know what would really happen if the appellant could be retried on the merits with access to all of the material that is now available. Clearly, an actual new trial would be preferable to this process. It is not, however, an option. In an effort to minimize the artificiality of this process, we have limited ourselves to interpretations of the material and inferences to be drawn from facts revealed by the material to those which are not only reasonable, but that in our view are

readily available from the material. Insofar as our assessment assists the appellant in challenging the Crown's case or in advancing his own case, we think the assessment is properly characterized as a cautious one.

[279] Our analysis of the likely outcome of a hypothetical new trial proceeds as follows:

- In Section A, we outline the new material that we conclude would not affect the Crown's case.
- In Section B, we examine the impact of the new information on the four main factual pillars upon which the Crown's case rested at trial.
- In Section C, we examine how the new material could be used to strengthen the case for the defence.
- In Section D, we discuss how the crime scene evidence, which is not changed in any way by the new information before us, could be relied on by the defence in attempting to raise a reasonable doubt.
- In Section E, we examine what is left of the Crown's case against the appellant.

## A. MATERIAL THAT DOES NOT AFFECT THE CROWN'S CASE

[280] The first item of the archival material that we conclude is not sufficiently compelling to affect the Crown's case, and thus does not affect our determination of the appropriate remedy, is a 1966 report of Inspector Graham, the lead O.P.P. investigator on the Harper murder. The report was prepared for Mr. Bowman, the lead Crown on the

first Reference, and related to a police interview on June 11, 1959 of an elderly couple who lived in Clinton at the time of the murder, Mr. and Mrs. Townsend. Mr. Martin, the appellant's counsel on the first Reference, asked Inspector Graham to look into information he received by way of a letter addressed to him indicating that the Townsends had provided information to police in 1959 that was of assistance to the appellant. The letter advised that the couple had passed away some two years later.

[281] Inspector Graham looked into the matter. According to his report to Mr. Bowman, Mrs. Townsend had reported to Constable Trumbley[15] on June 11, shortly before Lynne Harper's body was found, that she saw a young girl hitchhiking by the stop sign on the south side of Highway 8 just east of the County Road on the night Lynne disappeared. She recalled seeing a lot of bicycles on the bridge over the Bayfield River, but she did not recall seeing a boy or anyone standing on the bridge. Mr. Townsend interjected that this was not Tuesday night (*i.e.*, June 9), but Sunday night. Mrs. Townsend said it was getting quite dark at the time and she could not give a description of the girl. Inspector Graham advised that the police were satisfied that no further investigation of the Townsends' report was required as the couple agreed it was near darkness. Counsel for the appellant have not been able to find any other documentation relating to this interview with the Townsends in the archives, such as any notes Constable Trumbley may have taken.

[15] Constable Trumbley was one of the O.P.P. officers assigned to the Harper case.

[282] Counsel for the appellant argue that Inspector Graham's notes of what Constable Trumbley told him the Townsends had told Constable Trumbley several years earlier can somehow be admitted for the truth of its contents, that is, as the equivalent of the Townsends' testimony.

[283] There is no evidentiary basis upon which these notes could be received as if they constituted the testimony of the Townsends. In any event, even if the notes did reflect what the couple's testimony would have been, the notes do not help the appellant. The information found in them does not support his contention that Lynne was picked up at the highway at about 7:30 p.m. on June 9.

[284] Counsel for the appellant also argue that the information in the notes pertaining to the Townsends could have led the defence to valuable information had it been revealed in a timely fashion. Anything is possible. No one can say definitively that had the information been given to Mr. Donnelly, it would not have helped him. We have been offered no basis, however, upon which we could hold that it would provide any assistance at a hypothetical new trial. Nothing causes us to think that the information could lead anywhere.

[285] The appellant's counsel also make a much broader argument that the failure to pursue the information provided by the Townsends is an example of the failure by police to adequately investigate Lynne Harper's death. Counsel submit that the police focused

on the appellant very early in their investigation and did not effectively pursue other investigative leads that may have pointed to other possible suspects.

[286] Counsel accept that on the information now available, there is no third party suspect to whom they can point. They ask the court, however, to consider the narrow focus of the police investigation as a "lens" through which to view the remainder of the archival material that counsel have discovered.

[287] It is unhelpful and unnecessary to try to decide at this distant point whether the police unduly focused their attention on the appellant. The police had reason to suspect the appellant early in the investigation. It is also true, however, that police "tunnel vision" is a feature found in many miscarriages of justice. The outcome of this case does not require, and the material does not permit, an effective assessment of the adequacy of the police investigation.

[288] The information relied on by the appellant to suggest that the police improperly focused on the appellant comes in the nature of first- and second-hand hearsay suggesting that several other men who lived in and around the Clinton R.C.A.F. Station in 1959 could be described as having a propensity to sexually molest young girls. There is really nothing, however, that links any of these people to the homicide. We cannot say on the available material regarding these other individuals, some of whom were not identified by the police in 1959 and some of whom were ruled out as suspects by the police in 1959, that there is any information that should be brought to bear on our analysis of the

appropriate remedy in this case. The information is too speculative and inconclusive to give it any weight in deciding what remedy the appellant is entitled to in these proceedings.

[289] Another aspect of the archival material that is not sufficiently compelling to enter into the remedial analysis relates to the whereabouts of the Crown witness, Gerald Durnin (age eight). Evidence was before the jury of the appellant's claim to police that he saw Durnin at the river after he dropped Lynne off at the highway. Durnin testified at trial that he was not at the river on the evening of Lynne's disappearance, but was in Bayfield with his family. Crown counsel in his closing argument relied on the appellant's false claim that he had seen Durnin at the river as evidence of his guilty frame of mind.

[290] The appellant says that material found in the archives calls into question whether Durnin was in Bayfield on the evening Lynne disappeared. The material includes a handwritten note indicating that Durnin told the police that he "swam in pool" on June 9, as well as statements from Durnin's relatives indicating that they were not asked to relate his whereabouts that evening. We conclude that nothing in the archival material relating to Durnin's whereabouts, including information suggesting that he swam in a pool that evening, would assist the appellant in discrediting Durnin's evidence that he was not at the river near Highway 8 on June 9.

[291] In addition, the appellant proffered a volume of material both from the archives as well as information that has come to light since 1966, which counsel submit calls into

question the credibility and reliability of the trial testimony of the Crown's witness, Jocelyne Gaudet (age thirteen). Gaudet testified at trial that the appellant proposed that she meet him by Lawson's Bush on the evening of June 9 so that he could show her some new born calves. She said that she searched for him along the County Road, as well as on the tractor trail beside Lawson's Bush and at the bridge that evening, without success. We describe Gaudet's testimony in greater detail below, as well as the possible use that the defence could make of the archival material relating to her testimony at a hypothetical new trial (see paras. 390-504).

[292] The new evidence offered by the appellant in relation to the credibility and reliability of Gaudet's testimony includes the affidavit and testimonial evidence of Elizabeth Hulbert, a former nursing student who testified before Mr. Kaufman in 2002 and before this court in 2006. Ms. Hulbert claimed to recall a social gathering of nursing students around the time of the hearing of the first Reference in the Supreme Court of Canada during which Gaudet, a fellow nursing student, said, "I was one of the witnesses at the Steven Truscott trial and I lied." Ms. Hulbert further testified that Gaudet said she would get herself admitted at a psychiatric institution in order to avoid testifying before the Supreme Court. The appellant seeks to rely on the statements attributed to Gaudet both for the truth of the contents and for impeachment purposes.

[293] The appellant tendered as evidence capable of corroborating Ms. Hulbert's evidence the affidavit and testimonial evidence of Sandra Stolzmann, another former nursing student who also testified before Mr. Kaufman and this court. Ms. Stolzmann

recalled being present at the gathering and deposed that she overheard Gaudet admit to lying at the appellant's trial. In addition, the appellant tendered the nursing school evaluation records of Gaudet, which confirm that she was a nursing student at the college referred to by Ms. Hulbert and Ms. Stolzmann and further confirm that she was admitted to a psychiatric institution less than a week before the commencement of the Supreme Court Reference.

[294] We conclude that Ms. Hulbert's testimony regarding Gaudet's statements is not sufficiently compelling, whether for the truth of the contents or for impeachment purposes, to be considered in our analysis of whether the appellant is entitled to an acquittal. Ms. Hulbert's testimony regarding the statements attributed to Gaudet at a social gathering many years ago is not sufficiently precise to permit any conclusions to be drawn at this stage about the overall credibility or reliability of Gaudet's evidence at the appellant's trial. These statements do not reveal the manner in which Gaudet supposedly lied, or the underlying reason for why she would have herself admitted to a psychiatric facility to avoid testifying. Nor do the nursing school evaluation records indicate the reason for Gaudet's hospitalization. Furthermore, as the appellant's counsel candidly concede, Ms. Stolzmann's evidence about what Gaudet supposedly said in 1966 has changed considerably over time, and her recollection of events differs in many respects from Ms. Hulbert's.

[295] It is too speculative to conclude based on this body of evidence that Gaudet lied in her testimony in a way that might have affected the jury's verdict. If this evidence were

put to Gaudet for impeachment purposes, one can think of various explanations she may have given for these remarks that would not necessarily have the effect of undermining the credibility or reliability of the essential aspects of her trial testimony.

[296] The appellant further asked the court to receive evidence that was adduced in these proceedings from Robert Lawson, the owner of Lawson's Bush. That evidence is also said to undermine the credibility of Gaudet's trial testimony. Mr. Lawson testified as a Crown witness at trial. He testified before Mr. Kaufman in 2002 and before this court in 2006. It is clear that Mr. Lawson is and has been for some time a strong supporter of the appellant's innocence.

[297] In his 2006 testimony, Mr. Lawson recounted an incident that he said occurred during the appellant's trial in 1959. He said that Gaudet came to his farm and asked him to change his evidence concerning the time that she had come to his farm on June 9. Mr. Lawson could not recall exactly how Gaudet asked him to change his times, but he thought she wanted him to change his time to an earlier one, around 6:30 p.m. He said he did not find out why she wanted him to do this, nor did he advise anyone that she had asked him to do so until many years later. We conclude that the information provided by Mr. Lawson about this memory is simply too imprecise to warrant any consideration of what use the defence could make of it in attacking the credibility or reliability of Gaudet's evidence at a hypothetical new trial.

[298] The appellant also tendered Gaudet's recent testimony, which she provided before Mr. Kaufman in 2003 under subpoena, as fresh evidence relevant to her credibility. In her testimony, Gaudet said that she has no recollection of the events in 1959, or the events described by Ms. Hulbert and Ms. Stolzmann in 1966. She testified that she has memory problems due to an injury that she suffered sometime after 1984.

[299] The appellant asks us to conclude from her recent testimony that Gaudet is a dangerous witness who could have caused serious mischief at his trial. The nature of Gaudet's rather profane testimony does make clear that, as of today, she cannot provide credible or reliable evidence about the events during the period surrounding Lynne Harper's murder. However, her present testimony cannot assist this court in coming to any conclusions about her credibility or reliability as a child in 1959.

[300] We would also reject the two telephone interviews with Dr. Brooks given before Mr. Kaufman in 2002 and 2003, as providing any assistance at the remedial stage of our analysis. The appellant contends that the interviews should be admissible for the truth of their contents under the principled exception to the rule against admitting hearsay evidence in judicial proceedings. The Crown contends that the interviews cannot be received because Dr. Brooks was not mentally competent to testify at the time of the interviews and that, in any event, the content is not sufficiently reliable to permit the court to act upon it.

[301] Dr. Brooks was the senior medical officer at the R.C.A.F. Station in Clinton and was involved in the investigation of Lynne Harper's murder. He was eighty-one years old when he testified before Mr. Kaufman and was not capable of testifying before this court for health-related reasons. In his evidence before Mr. Kaufman, Dr. Brooks testified that from the outset of the investigation into Lynne Harper's murder, he was convinced of the appellant's guilt and that he lacked objectivity in how he conducted his investigation. He also said that he was biased against the appellant in presenting his evidence at trial. Dr. Brooks further testified that he and other investigators felt pressured to come up with a resolution of the case as soon as possible.

[302] We find it unnecessary to rule on whether Dr. Brooks was competent when he testified before Mr. Kaufman. Regardless of his competency, we are not satisfied of the reliability of his testimony some forty-odd years after the fact. In his recent interviews, there were numerous occasions when Dr. Brooks acknowledged his lack of memory of the events he was being asked about. Aside from our concerns that Dr. Brooks' memories of the events of 1959 have faded or have been lost, there is also a risk that his memories have been influenced by what he has acknowledged having read about the appellant's case, and/or by his admitted contact with a journalist from the *fifth estate* who interviewed him several times about his involvement in the case. In light of these considerations, we are not prepared to act on Dr. Brooks' recent testimony in determining the remedy to which the appellant is entitled.

[303] We now turn to our discussion of a hypothetical new trial and the new material that we conclude could have an impact on the four main pillars of the Crown's case.

## B. THE FOUR PILLARS OF THE CROWN'S CASE

[304] We referred earlier in these reasons to the four primary factual pillars of the Crown's case. To repeat, they were as follows:

- the time of Lynne Harper's death;
- the County Road evidence;
- the appellant's post-offence conduct; and
- the penis lesions evidence.

[305] We propose to review the impact of the new material on each of the four pillars of the Crown's case. We recognize, however, that ultimately the case must be viewed as a whole and not as a series of isolated groupings of evidence.

### THE FIRST PILLAR OF THE CROWN'S CASE: THE TIME OF DEATH

[306] We begin with the Crown's claim that Lynne Harper died before the appellant returned to the school grounds at about 8:00 p.m. on June 9. We have already outlined the relevant evidence. To repeat, the Crown relied primarily on Dr. Penistan's opinion fixing Lynne's death at between 7:00 and 7:45 p.m. on June 9. If the jury accepted this evidence and found as a fact that Lynne was dead before 8:00 p.m., then the appellant had the virtually exclusive opportunity to kill her. He was the only person known to be with her during this time frame in close proximity to Lawson's Bush where her body was

found and where the murder took place. The importance of the evidence of Lynne Harper's time of death to the Crown's case can hardly be overstated.

[307] In these proceedings, the appellant challenged the claim that Lynne Harper was dead before 8:00 p.m. in two distinct ways. First, as reviewed above, he relied on new evidence from experts in the fields of pathology and gastroenterology and he produced archival documents that bring into question Dr. Penistan's credibility and the reliability of his opinion on the time of death. Second, the appellant adduced a substantial body of evidence from forensic entomologists that purports to fix a time of death by reference to the development of insect larvae found on the body of Lynne Harper. The method used by these entomologists in fixing a time of death was unknown in 1959.

**1. The Pathology Evidence**

[308] In Part III of these reasons, we reviewed the new evidence related to pathology and the determination of time of death based on stomach contents. We explained why this evidence could reasonably be expected to have affected the result both at the trial and at the first Reference. This conclusion necessitates quashing the conviction. We do not propose to repeat the substance of that evidence here. It is sufficient to observe first, that the expert evidence received as fresh evidence demonstrates that the stomach contents and the postmortem changes, considered as a whole, are no more consistent with death before 8 p.m. on June 9 than they are with death after 8 p.m. On the current state of the expert evidence, this evidence assists the Crown only to the extent that it does not rule out the possibility that Lynne died before 8 p.m. on June 9. This is a far cry from the

state of the expert evidence on time of death at trial and even at the first Reference. Second, the fresh evidence we received relates directly to Dr. Penistan's credibility and the reliability of his opinion evidence. For the reasons set out above, the fresh evidence could reasonably be expected to significantly undermine any confidence that a jury could have in Dr. Penistan's firm opinion that Lynne Harper died before 7:45 p.m. on June 9.

**2. The Entomology Evidence**

**(i) Introduction to the entomology evidence**

[309] In 1959, there was no realistic possibility that entomology could assist in solving the murder of Lynne Harper. Yet, by good fortune, two events combined to create factual data that arguably now permit the modern science of forensic entomology to shed some light on the time of Lynne Harper's death.

[310] The first piece of good fortune occurred when Dr. Penistan collected samples of insect maggots and eggs from different areas of Lynne Harper's body, both at the scene where the body was found and later during the autopsy. The second event occurred when these samples were sent to the Attorney General's laboratory where they came into the hands of Mr. Elgin Brown. Fortuitously, Mr. Brown had been trained in entomology at the Ontario Agricultural College in Guelph. He reared the larvae samples that were sent to him and was able to identify specimens from one sample to the level of family, and specimens from the other sample to the level of genus.[16] Almost fifty years later, this

[16] All living organisms are classified in a hierarchical taxonomic structure. The species classification is the most specific, followed by genus, tribe (not always used) and family.

information provides the raw material for opinions by entomology experts on the time of Lynne Harper's death.

[311] In this section, we discuss the theory behind forensic entomology, the factual foundations for the opinions advanced in these proceedings and the substance of those opinions. We conclude this section by considering the potential effect of these opinions at a hypothetical new trial. This effect turns on the likelihood of the admissibility of the evidence and on an assessment of the potential cogency of the evidence.

**(ii) Credibility of the entomology experts**

[312] Before engaging in a detailed analysis of the substance of the expert evidence, it is appropriate to begin with general observations about the credibility of the entomology experts. Broadly speaking, all of the experts whose opinions were placed before the court, except one, offered at least some support for the appellant's claim that Lynne died hours after 8:00 p.m. on June 9 and probably some time the next morning. The sole exception was Dr. Neal Haskell, an expert called by the Crown. Dr. Haskell's opinion supported a finding that Lynne died before 8:00 p.m. on June 9.

[313] Dr. Sherah VanLaerhoven and Dr. Richard Merritt, who testified for the appellant, gave evidence in a careful and measured way. Their evidence was indicative of an objective consideration of the relevant factual data. The same cannot be said for Dr. Haskell. Despite what would appear to be impressive credentials, Dr. Haskell tended to overstate the effect of his opinion. He was dogmatic and reluctant to admit obvious errors. He assumed an adversarial position as revealed in correspondence with the Crown

that Crown counsel disclosed to the appellant's counsel. Several critical elements of his opinion were based on nothing more than his purported experience, which could not be verified and was not supported by any empirical work. He was unable to demonstrate that his experience had been replicated by other scientists.

[314] At a hypothetical new trial, the absence of evidentiary support for the factual assumptions on which Dr. Haskell's opinion are based could potentially lead to the exclusion of his opinion by the trial judge. Even if the trial judge were to find that his opinion cleared the admissibility hurdle, we think it is unlikely that a reasonable jury would place any reliance on his opinion.

**(iii) The theory of forensic entomology**

[315] The theory behind the use of entomology to determine time of death is deceptively simple. The key concept is the "postmortem interval" or "PMI", that is, the interval between the time of death and the collection of insect specimens from the body. With knowledge of the colonization habits of the insects and how soon after death they deposit their eggs or larvae on a corpse, one should be able to make an estimate of the time of death. While there are different ways of estimating the PMI using entomological information, the experts involved in this case used the type of analysis employed in the following method.

[316] The entomologist first identifies the species of insect larvae (also referred to as maggots) collected from the body and their stage of development at the time of collection. Using data on rates of larval development that have been assembled over

many years, as well as other information such as the air temperature where the body was located, the entomologist calculates how long the larvae must have been on the body to reach the stage observed when the samples were collected. If the insect is of a species known to deposit eggs or larvae on a corpse very soon after death, the PMI should closely correspond with the time of death. An important factor is identifying the oldest larvae, since it is the oldest larvae that will provide the most accurate PMI. Put another way, the entomologist wants to collect the larvae that have been on the body for the longest time. There are, of course, other variables in this exercise and many come into play in this case.

[317] The critical questions in this case are whether it is possible to identify the type of insects that were found on the body and the stage of development they had reached at the time of collection. As the appeal developed, the contest between the appellant and the Crown became largely focused on these questions. The appellant says that there is sufficient information to identify the type of insect and the stage of development; the Crown says there is not. There were some other disputes between the experts about the data that should be used to estimate the PMI, but they can be resolved with varying degrees of certainty. At the end of the day, the critical issues are the identification of the type of insect and the stage of development reached.

[318] During the hearing of the appeal, the court was provided with an abundance of evidence concerning the development of various types of insects, their habits and the way to calculate the PMI. In the course of our reasons, we refer to only as much of this information as is necessary to understand our ultimate conclusion.

[319] Insects, in particular flies, provide a means of estimating time of death because of their life cycle. Most flies lay eggs that hatch into larvae. Some flies lay larvae rather than eggs. The larvae develop in three stages called instars. If it can be determined what instar the larvae are in when they are collected and, better yet, at what part of the instar (*i.e.*, early, mid- or late), the entomologist can make an estimate of the PMI. The length of the larvae is indicative of what instar they are in. The entomologist also requires other information such as the temperature of the area where the body lay during the relevant interval. Temperature is a crucial variable because the rate of development of larvae depends upon the amount of heat available.

[320] One other fact is important to this case. The flies involved in this case are diurnal, that is, they do not deposit eggs or larvae at night. However, larvae will continue to grow during the night, provided there is sufficient heat available.

[321] Entomologists cannot pinpoint with absolute precision the PMI. Rather, they provide a range of time during which the insects likely deposited their eggs or larvae. As was explained by the appellant's experts, if the PMI range extends from several hours of darkness and into early daylight hours, the reasonable inference is that the eggs or larvae were deposited in the daylight hours, *i.e.*, after sunrise. Similarly, if the PMI covers a period from the late afternoon or evening and into the night, it is likely the eggs or larvae were deposited before sunset. It is only if the range of time falls completely during hours of darkness that it is presumed that colonization occurred during daylight hours the preceding day.

[322] This case concerns two families of flies: *Sarcophagidae* or flesh flies and *Calliphoridae* or blow flies. We use the common terminology of flesh flies and blow flies. Flesh flies arrive after death and deposit first instar larvae. Blow flies arrive after death and deposit eggs. Blow flies lay hundreds of eggs at a time, while flesh flies deposit many fewer live larvae. There are several genus or tribes of flesh flies and blow flies and many species within the tribes, which develop at different rates.

[323] In this case, Mr. Brown reared larvae and found both blow flies and flesh flies. He identified the blow fly as belonging to the genus *Calliphora* or blue bottle flies. He was unable to identify the genus of the flesh flies. He was also unable to identify the species of either the blow fly or the flesh fly.

[324] There was some attack by the Crown expert, Dr. Haskell, on Mr. Brown's ability to identify the flesh fly and to determine the genus of blow fly that he had raised back in 1959. Mr. Brown testified before us. We are fully satisfied that a reasonable jury would conclude that he had the necessary expertise to make the identifications. He not only had taken university courses in entomology, but his notes show, and he confirmed in his testimony, that before making his identifications, he consulted with some of the leading experts in Canada. We therefore proceed on the basis that Mr. Brown's identifications of the flies were accurate.

**(iv) The critical entomology issues: identification of type and stage**

[325] Many decades removed from 1959, there are six sources of information about what specimens Dr. Penistan collected and where and when he collected them: (1) the various versions of his autopsy report; (2) Dr. Penistan's testimony at the preliminary inquiry and at the trial and an article he wrote in 1969; (3) Dr. Brooks' testimony; (4) Corporal Sayeau's notes and testimony;[17] (5) Mr. Brown's report, his contemporaneous notes and his testimony on the present Reference; and (6) the photographs taken at the scene and at the autopsy.

**(1) Dr. Penistan's autopsy reports**

[326] In the area of the entomology evidence, Dr. Penistan's three autopsy reports, especially the last two versions, are relatively consistent and so we only refer to his official autopsy report. That report contains the following observations about insect activity:

> Innumerable fly eggs deposited on hair
>
> …
>
> [Under the heading "Parts Preserved"] Samples of maggots and ova as described in text.
>
> …
>
> Eggs and Larvae (maggots): Innumerable fly eggs are deposited in sheets and linear strands in hair and over lower abdomen. *Around the nose and mouth, innumerable maggots, about 1/16 in. long. In the skin lesions and about the vulva, larger maggots, up to 1/4 in.*

[17] Corporal Sayeau was one of the O.P.P. officers assigned to the investigation in 1959.

> *long*. Samples of these were preserved under seal No. AG 2283 and handed to Corporal Sayeau.
>
> …
>
> [Under the heading "Posterior aspect of body"] *A 1/8 in. diameter circular penetrating lesion, full of maggots*… A similar lesion in the skin of the left buttock 2 in. from the mid-line, *containing a ¼ in. larva (preserved)*. [Emphasis added.]

[327] We observe that in the autopsy report, there is reference to only one seal number for the specimen samples that were removed from the body: AG 2283.

**(2) Dr. Penistan's testimony and his 1969 article**

[328] Dr. Penistan arrived at the scene where the body was discovered in Lawson's Bush at 4:45 p.m. on June 11, 1959. At the preliminary inquiry, Dr. Penistan gave the following testimony about insect activity that he had observed at the scene:

> I wish to mention at this stage the presence on the body of a large number of fly eggs. There were many flies in the vicinity. These [the fly eggs] were very heavily deposited in the hair and over the eyes. In certain areas these had hatched out, and there were innumerable maggots about one-eighth of an inch long in the region of the nose and mouth.

He went on to testify that there were "rather larger [maggots] one-quarter of an inch long around the crotch of the body."

[329] Also at the preliminary inquiry, Dr. Penistan provided evidence about insect activity that he had observed at the autopsy, which commenced at 7:15 p.m. on June 11 at

the Ball and Mutch Funeral Home in Clinton. He said there was a "tremendous population of maggots" in the vaginal area. He also stated:

> On the basis of *rigor* I would consider that death had taken place approximately two days before. The eggs and maggots which have been laid and hatched on the body suggest a similar period, perhaps longer, but the weather was hot, as I recall, and the body was lying in a pretty damp environment. The eggs and maggots would therefore tend to hatch rapidly. There were early postmortem changes in the fat under the skin of the body and in the major organs of the body. All these findings I feel were compatible with death one and a half to two and a half days before the autopsy was done.

[330] Dr. Penistan gave similar evidence at trial, with two exceptions. He described the the vaginal area as "seething with maggots" as opposed to there being "a tremendous population of maggots" in that area; perhaps a distinction without a difference. More importantly, he described the maggots "in the region of the nose" and "particularly in the region of the sexual parts" as "measuring up to a quarter of an inch in length."

[331] As the above review demonstrates, Dr. Penistan gave three different estimates of the size of the maggots around Lynne Harper's nose and mouth. In his autopsy report, presumably prepared near the time of the autopsy, he described the maggots as "about one-sixteenth of an inch". At the preliminary inquiry, Dr. Penistan said these maggots were "about an eighth of an inch". At trial, he testified that they measured "up to" one-quarter of an inch. When Dr. Penistan was testifying at the preliminary inquiry and at the trial on the issue of the size of the maggots around Lynne Harper's nose and mouth, it is quite unlikely that he referred to his notes to refresh his memory on this point. There is

no suggestion that Dr. Penistan was providing his size estimates of the maggots with any notion that the length of the maggots could somehow affect his or anyone else's opinion on the time of Lynne Harper's death.

[332] Dr. Penistan also referred to the size of the maggots on Lynne Harper's body in an article published in the September 1969 edition of the Canadian Society of Forensic Science Journal. In the article, *The Harper Autopsy*, Dr. Penistan wrote:

> Innumerable fly eggs had been deposited in sheets and streaks in the hair of the head and on the skin of the lower abdomen. *Maggots about 1/16" (1.5 mm.) long swarmed about the nose and mouth* and larger maggots up to 1/4" (6 mm.) long were present about the vulva and in some of the skin lesions described below. [Emphasis added.]
>
> …
>
> Subsequent laboratory examination showed the maggots to be 1st. instar larvae of the blow fly.
>
> …
>
> External Marks of Violence
>
> …
>
> A 1/8" (3 mm.) diameter circular penetrating lesion full of maggots, surrounded by a 9/16" (14 mm.) diameter area of brownish discolouration of skin, was present on the right side of the back over the tenth rib.
>
> …
>
> Internal Appearances
>
> …
>
> The lower part of the vagina was swollen and badly autolysed and whether the hymen had been intact or had been recently

> damaged could not be determined because of the depredations of the swarms of maggots and the postmortem degeneration.

[333] It is not possible to determine from Dr. Penistan's autopsy reports, testimony or his article exactly when he ascertained the length of the maggots and whether he used a ruler or simply estimated their length. We note that a ruler with both inches and metric markings is plainly visible in several of the autopsy photographs.

**(3) Dr. Brooks' testimony**

[334] Dr. Brooks was present at the autopsy and took notes for Dr. Penistan. At the trial he testified that he observed that in the entrance to the front passage of the genitals there were "masses of maggots about in this region".

**(4) Corporal Sayeau's notes**

[335] Corporal Sayeau gave no relevant evidence at the preliminary inquiry or the trial about insect activity. His police notes, however, contain the following information:

> 5:30 p.m. [*i.e.* at the scene] Rv From Dr. Penistan 1 Jar marked "eggs and maggots" Seal AG 2283
>
> 8:10 p.m. [*i.e.* at the autopsy] Rv From Dr. Penistan 1 Jar said to contain maggots from skin lesion of left buttock cut from body of Lynne Harper at Ball & Mutch Funeral Home, Clinton Seal AG 22839

[336] We are satisfied as to the accuracy of Corporal Sayeau's notes that two separate specimens were collected by Dr. Penistan and kept in two separate containers.

**(5) Mr. Brown's report, notes and testimony**

[337] Mr. Brown's laboratory report dated July 7, 1959 contains the following information about insect activity:

> "Q" Maggots contained in a glass jar with metal screw top sealed with Seal A.G.-22839 - jar bears label with notation - "Maggots from skin lesion of left buttock, etc."
>
> "R" Maggots and eggs contained in a glass jar with metal top sealed with seal A.G. 2283. The jar bears a label with notation - "Eggs and maggots from abdo & nose, etc."

[338] At this point we note two discrepancies between Corporal Sayeau's notes and Mr. Brown's notes. First, the description of the label on A.G. 2283, which later becomes item "R" [the scene specimen], contains more information according to Mr. Brown than Corporal Sayeau. Mr. Brown's report states that, in addition to reading "eggs and maggots", the label also reads "from abdo & nose". Second, Mr. Brown has used the term "etc." in describing the labels of both item "Q" [the autopsy specimen] and "R" as if there was other information on both labels.

[339] In the section in his report on his findings, Mr. Brown wrote as follows:

> "Q" Maggots are flesh fly larva (family *Sarcophagidae* genus *sarcophaga)* Unable to determine species and approximate time of deposit.
>
> "R" Larvae are first instars of the blow fly (Family, *Calliphoridae* genus *Calliphora).*

[340] Mr. Brown also made notes at the time he received the exhibits from Corporal Sayeau. These notes include the following notation:

Q & R  1/16" to 1/4" long.

[341] Mr. Brown testified before us that this note meant that the maggots in the samples he received ranged in length from one-sixteenth of an inch to one-quarter of an inch. He was unable to recall whether he actually measured the maggots. He testified, however, that the maggots in item "R" were in the first instar. He based this determination on their length and having watched them as he reared them. In his testimony he indicated that he was certain that they were in the first instar.

**(6) The photographs**

[342] An attempt was made by one of the appellant's experts to engage an engineering firm to determine the size of the maggots as observed in photographs of Lynne Harper's body. That attempt failed. However, the photographs are of some assistance. The eggs and maggots about the face and hair as described by Dr. Penistan can be clearly seen. While one can also see eggs and maggots about the abdominal area, no mass of maggots can be seen in the vaginal area, and only a few eggs are visible in that area.

[343] The experts who testified before us gave the following evidence about their observations. The Crown's expert, Dr. Haskell, testified that it was possible to see larger (*i.e.*, up to one-eighth of an inch) larvae on the face. Dr. Merritt, one of the appellant's experts, testified that he did not see any maggots on the face that were larger than the eggs and that blow fly eggs are typically 1.4 to 1.5 mm. (*i.e.*, approximately one-sixteenth of an inch).

[344] Dr. Haskell's testimony on this issue was unconvincing. That said, we think the photographs are not by any means conclusive of the precise length of the maggots on the face. At most, it can be said that the photographs indicate that the length of these maggots is consistent with the lengths recorded by Dr. Penistan in his autopsy reports and in his 1969 article.

**(v) Conclusions on the type and stage of development of the larvae that Dr. Penistan removed from the body**

**a) Type of larvae removed by Dr. Penistan**

[345] Mr. Brown's evidence indicates that the specimens in item "R" were collected from the face and abdomen and were blow flies of the *Calliphora* genus.

[346] There was a serious dispute between the experts about where the specimens that became Mr. Brown's item "Q" came from. We think it is a reasonable interpretation of the evidence that item "Q" contained maggots from the skin lesion on the left buttock, as described in Corporal Sayeau's notes and on the seal accompanying the glass sample jar. There is not a reasonably reliable body of evidence to establish that this sample also came from the vulva area. The autopsy report includes the following reference: "In the skin lesions and about the vulva, larger maggots, up to 1/4 inch long. Samples of these were preserved under seal No. AG 2283." However, this reference is ambiguous and does not justify the inference that the maggots preserved by Dr. Penistan came from both the lesion and the vaginal area.

[347] Even though there is no direct evidence on the family of the maggots that colonized the vaginal area, we think the most reasonable interpretation of the evidence would be that these were flesh flies, not blow flies. We say this primarily because no mass of blow fly maggots can be seen in the photograph of this area. As Drs. VanLaerhoven and Merritt both testified, if a member of the blow fly family had colonized this area, one would expect to find a mass of larvae in the vaginal region, as was the case on the hair, face and abdomen. As we have said, a single blow fly lays hundreds of eggs at a time, whereas a flesh fly lays only a few live larvae.

[348] Dr. Haskell testified that in his opinion, the maggots observed by Dr. Penistan in the vaginal area were blow flies. He drew this inference primarily from the testimony of Drs. Penistan and Brooks that the area was "seething" with maggots and that there was a "tremendous population" of maggots. Dr. Haskell thought these descriptions were more consistent with blow fly maggots than flesh fly maggots.

[349] Dr. Haskell also supported his opinion that the larvae observed in the vaginal area were blow flies based on his theory that the blow flies would be preferentially attracted to the trauma in the vaginal area rather than to the mucous membranes in the nasal area. He provided no scientific evidence to support this theory.

[350] We set out above our general assessment of Dr. Haskell's credibility. On this subject, we think a reasonable jury would likely prefer the evidence of Dr. Merritt. Dr. Merritt has never witnessed blow flies colonizing the genital area before the mucus

membranes in the face, even with wounds in the vaginal area present. He also testified that he does not know of any reason why blow flies would colonize the vaginal area and then wait a day before colonizing the facial area. Yet that order of colonization would have to have occurred on Dr. Haskell's view of the evidence, given the difference in size between the maggots observed in the vaginal area (up to one-quarter of an inch) and those observed in the facial area (about one-sixteenth of an inch).

[351] As to the significance placed by Dr. Haskell on the descriptions of "seething" and "tremendous population" found in Dr. Penistan's evidence, it was the opinion of the appellant's experts that these descriptions are consistent with flesh fly activity in a small area. We note that the penetrating lesion from which item "Q" was removed and which undoubtedly contained flesh flies was described as "full of maggots" by Dr. Penistan. In our view, a reasonable jury would in all likelihood prefer the defence evidence over Dr. Haskell's evidence that these adjectives signify blow fly colonization.

**b) Stage of development of the larvae removed by Dr. Penistan**

[352] We turn next to the issue of the stage of development reached by the larvae samples. In our view, it is a reasonable interpretation of the evidence to find that Dr. Penistan measured the maggots and that he did so at the autopsy and not at the scene where the body was found. Even if it could only be said that he estimated the length of the maggots, it would still be open to a jury to conclude that the description in his autopsy report (about one-sixteenth of an inch) was a valid approximation of the size of the maggots in the facial area. In his autopsy report, Dr. Penistan drew a distinction between

the maggots around the nose and mouth, which he recorded as being "about 1/16 in. long", and the maggots in the skin lesions and about the vulva, which he recorded as being "up to 1/4 of an in. long". It seems unlikely that Dr. Penistan would arrive at these small distinctions without making actual measurements.

[353] Mr. Brown's evidence supports a conclusion that the maggots around the nose and face were one-sixteenth of an inch. Mr. Brown's evidence indicates that the maggots in item "R" were in the first instar. This would tend to place those maggots in the range of 1.4 to 1.5 mm., *i.e.*, one-sixteenth of an inch, although a *very late* first instar blow fly maggot could be up to one-eighth of an inch (one-eighth of an inch equals 3.2 mm).

[354] We are satisfied that a reasonable jury could accept the opinion of the appellant's experts that, at the time of the autopsy, the maggots in item "R" were close to one-sixteenth of an inch, and thus were likely in the first half of the first instar stage of development.

[355] There is no direct evidence of the size of the oldest flesh flies on the body. We think it is reasonable to assume, as did the appellant's experts, that Dr. Penistan observed flesh fly maggots in the vaginal area and that his measurement of up to one-quarter of an inch was accurate.

[356] The appellant's experts differed somewhat on the stage of development of these flesh flies. Dr. VanLaerhoven thought they were at the end of the first instar stage or had

just entered the second instar, while Dr. Merritt described them as being early to mid-second instar.

[357] Dr. Haskell proceeded on the assumption that the oldest larvae in the vaginal area were blow flies of the green bottle genus and that they were in the second instar stage of development. We have already explained why a reasonable jury would in all likelihood reject his assumption that the flies in this area were blow flies.

**(vi) What does the evidence on type and stage mean?**

[358] We have pointed out that to accurately identify the PMI, it is necessary to identify the oldest larvae that were on the body at the time of removal. But, the oldest larvae are not necessarily the largest. In particular, because flesh flies lay maggots rather than eggs, larger flesh fly maggots may actually have colonized the remains after or at the same time as blow flies. Therefore, it is necessary to determine the PMI that is indicated by both the flesh flies and the blow flies, since it is not possible to know which was on the body for the longest time based solely on length.

[359] The next issue to consider is the starting time for the calculations of the PMI. As we have said, we consider the most reasonable interpretation of the evidence is that the maggots were measured by Dr. Penistan at the autopsy. On this interpretation, as the appellant's experts indicated, the time to start the calculation of the PMI is at approximately 8:00 p.m. on June 11. This is the time that Corporal Sayeau recorded as when he received the maggots from the skin lesion of the left buttock. We think it would be reasonable to conclude that these maggots were measured close to that time. We also

think it would be reasonable to conclude that at around the same time, Dr. Penistan measured the maggots on the face. We agree with Dr. Merritt that it is also a reasonable assumption that Dr. Penistan measured the larvae that remained on the face and not the scene specimens that Corporal Sayeau had placed in the sample jar some three hours previously.

[360] Depending on the developmental data used by the experts and the other assumptions they made, the experts came up with various PMIs for the blow flies and the flesh flies. We first consider the experts' opinions on the PMI as indicated by the blue bottle blow flies collected from the face and abdomen – item "R" of Mr. Brown's report.

**a) Blow fly PMI**

[361] Drs. VanLaerhoven and Merritt assumed that the largest larvae from the face and abdomen were up to 2 mm in length, *i.e.*, slightly more than one-sixteenth of an inch. They concluded that these maggots were therefore in the first half of the first instar of development. Drs. VanLaerhoven and Merritt used different methods for determining the PMI. As we have said earlier, none of the experts claimed that it was possible to pinpoint the PMI with precision; they could only offer a range of time during which the eggs or maggots, as the case may be, could have been deposited.

[362] Dr. VanLaerhoven used a linear regression model in which she employed developmental data assembled by a number of researchers in relation to the species of blue bottle fly that most likely colonized the body of Lynne Harper. An associate of Dr. Haskell, Dr. Leon Higley, prepared a report that was highly critical of

Dr. VanLaerhoven's method. Dr. VanLaerhoven answered the major criticisms he advanced.[18] We are satisfied that a reasonable jury could regard her method as a reliable one and conclude that Dr. Higley was wrong and misunderstood certain critical parts of Dr. VanLaerhoven's method.

[363] Dr. VanLaerhoven testified that there is a ninety-five percent probability that for the blow flies to have reached 2 mm in size at the time of the autopsy, they had to have been deposited in the daylight hours sometime after 11:00 a.m. on June 10.

[364] Dr. VanLaerhoven agreed that she could not exclude the possibility that the eggs were deposited before sunset on June 9, but she thought it unlikely because of their size. Had they been deposited before sunset, they would have had the night to feed on the remains and would be expected to have been larger than 2 mm.

[365] While the experts all agreed that blow flies will colonize a corpse within minutes of death, one issue that was raised in the various expert reports was whether blow flies would have laid eggs in the hours between 7:00 p.m. and sunset in the prevailing weather conditions in June. Dr. VanLaerhoven therefore conducted an experiment in June 2006 at Lawson's Bush using animal carcasses. The weather conditions in June 2006 were similar to those in 1959. However, there had been a significant change in the use of the land. Mr. Lawson no longer kept cattle in the field adjacent to the bush where the body

[18] For example, Dr. Higley claimed that Dr. VanLaerhoven used development data from multiple species to derive a model for a single species, which he said is misleading because different species within the same genus have different rates of development. Dr. VanLaerhoven pointed out that she did not in fact combine data for multiple species; rather, she combined multiple data sources on development rates for a single species.

was found. As a result, there were not the fresh piles of manure, which are breeding grounds for flies, especially flesh flies. Dr. VanLaerhoven fairly conceded that her attempt to exactly replicate the conditions by spreading manure in the area shortly before the placement of the animals was not successful. Even so, her experiment confirms that blow flies, including blue bottle flies, will colonize a corpse in the time period after 7:00 p.m. and before sunset in those weather conditions.

[366] Dr. Merritt, using different data than Dr. VanLaerhoven, came to a similar conclusion on the PMI as indicated by the blue bottle blow flies**.** His data, referred to as the Kamal data after the researcher who collected it, showed that the blow fly eggs were likely deposited sometime after 2:00 a.m. on the morning of June 10. Since blow flies are not active at night, the eggs would have been deposited on the body sometime after sunrise on June 10. There are some weaknesses in Dr. Merritt's opinion because of his use of the Kamal data, the accuracy of which has been criticized by other entomologists, including the Crown's other expert on entomology, Dr. Gail Anderson. However, Dr. Merritt's opinion purports to compensate for that criticism by building error terms into his calculations. We think a reasonable jury could be satisfied that he provided a reliable opinion.

[367] Dr. Anderson, a leading Canadian expert in entomology, was first consulted by the Crown when it appeared that it might be possible to use entomological evidence to assess Lynne Harper's time of death. She did not testify before us, but on consent, her various reports were filed. Her opinion evolved somewhat over time as she received more

accurate information about Mr. Brown's findings. In the end, a fair reading of her reports indicates that, overall, she agrees with the opinions of Drs. VanLaerhoven and Merritt.

[368] We note two important concerns in respect of the opinions of the appellant's experts. First, a slight increase in size, of about a millimetre, would place the blow fly maggots found on the face at the end of the first instar. In that case, if Kamal's developmental data is used in calculating the PMI, the likelihood that the eggs were deposited prior to sunset on June 9 increases. It is difficult to quantify the likelihood of this possibility. Much depends upon the reliability of the observations of larval length of Dr. Penistan and Mr. Brown as recorded almost fifty years ago.

[369] Second, Drs. VanLaerhoven and Merritt made assumptions as to the species of blue bottle fly that colonized the body. If in fact they were of a different species than assumed by these experts, then their conclusion on the PMI could be wrong. That said, these experts provided cogent reasons for choosing the species that they did. We are satisfied that a reasonable jury could conclude**,** as did Dr. Anderson, that their assumptions on species do not undermine the value of their opinion.

[370] In Dr. Haskell's opinion, the oldest larvae found on the body were one-quarter of an inch blow flies of the green bottle fly species from the vaginal area, which were the result of colonization of the body prior to sunset on June 9. We have already given our reasons for concluding that a reasonable jury would likely reject his theory that the maggots in the vaginal area were blow flies. We also note that Mr. Brown did not rear

any green bottle flies from the samples in items "Q" and "R". It would seem that Dr. Haskell chose this particular species, in part, because it is difficult to rear (which would explain why Mr. Brown did not identify it) and because it has one of the quickest rates of development. One final problem with Dr. Haskell's theory is that if indeed the body was colonized by the species of green bottle fly he thought most likely, then the PMI indicates that colonization occurred while Lynne Harper was still alive. Because we conclude that a jury would likely reject Dr. Haskell's evidence that the maggots observed in the vaginal area were blow flies, we need not deal further with his opinion on the PMI indicated by the blow flies.

**b) Flesh fly PMI**

[371] At this juncture, it is necessary to deal with another aspect of Dr. Haskell's evidence. He advanced a theory, which was referred to as the "fly-by" theory, regarding the reproductive behaviour of flesh flies. According to this theory, flesh flies may arrive at a body soon after death, but they will delay in depositing larvae for a minimum of twelve to twenty-four hours after death. Consequently, according to Dr. Haskell, when entomologists are calculating the PMI based on colonization of a body by flesh flies, they must add a minimum of twelve to twenty-four hours to the PMI in order to account for this delay factor in the reproductive behaviour of flesh flies.

[372] The scientific literature offers little support for Dr. Haskell's fly-by theory. The appellant's experts contradicted his position. Even more tellingly, Dr. Haskell gave the opposite opinion on flesh fly behaviour when he provided a report to the Ontario Crown

Attorney in relation to a first degree murder case in 1992. Eventually, Dr. Haskell appeared to concede that his fly-by theory could not be stated as dogmatically as he had originally put it. We conclude that a reasonable jury would likely give no weight to Dr. Haskell's evidence on this fly-by theory.

[373] Having said that Dr. Haskell's fly-by theory relating to flesh flies would in all likelihood be rejected by a jury, there did seem to be some consensus that flesh flies may colonize a corpse somewhat later after death than blow flies. The delay would depend on many variables such as the availability of a source of breeding material for flesh flies – for instance, manure, in the vicinity - and the species of flesh flies in the area. The appellant's experts believed that because Mr. Lawson kept cattle in the field adjacent to the bush, conditions were excellent for flesh flies to colonize dung and some of these same species are known to colonize carrion.

[374] Dr. Merritt also indicated that the pattern of blow fly colonization in the facial area of Lynne Harper's body and flesh fly colonization in the genital area would be consistent with the flesh flies laying larvae after the blow flies had laid their eggs. According to Dr. Merritt, blow flies are attracted to mucous membranes in the facial area and are not generally seen in large numbers in the genital area. The flesh flies, which typically colonize the body somewhat later, would select areas to colonize other than the face so as to avoid competition with the blow flies and to maximize the likelihood that their offspring would survive.

[375] As noted above, Dr. VanLaerhoven thought that the flesh flies were at the end of the first instar stage or had just entered the second instar stage. On that basis, she concluded that there was a ninety-five percent probability that the larvae were deposited between 7:00 a.m. and 11:00 p.m. on June 10. Dr. Merritt thought that the flesh flies were early to mid-second instar. He was of the view that these maggots were likely deposited sometime between noon on June 10 and 3:00 p.m. on June 11. Put another way, both of the appellant's experts put the earliest time of colonization by flesh flies to be the morning of June 10.

[376] We emphasize here, however, that a reasonable jury would most likely conclude that the flesh flies provide a less cogent basis for estimating the time of death because the interval between when the deceased was killed and the initial colonization of the body by flesh flies is more uncertain than is the case with the blow flies.

[377] Dr. Haskell was of the view that flesh flies colonized the body during the mid-afternoon on June 10. He was also of the view that, because flesh flies delay colonization for twelve to forty-eight hours after death, death must have occurred at least twelve to twenty-four hours earlier than mid-afternoon on June 10. Thus, his opinion was purportedly consistent with the Crown theory. Since we conclude a jury would not accept Dr. Haskell's fly-by theory, we also conclude that a jury would not likely accept his opinion that the flesh fly PMI shows that death occurred on June 9. In the result, if his opinion were admitted, a reasonable jury could find that his opinion concerning the flesh fly PMI is supportive of the appellant's experts.

**(vii) Conclusion on the value of the entomology evidence**

[378] If the entomology evidence tendered in these proceedings were presented at a hypothetical new trial, the trial judge would first have to determine whether there was a sufficient factual foundation in the evidentiary record capable of supporting the opinions offered by the experts. If the trial judge concluded that there was an insufficient factual foundation, then the experts' opinions would be of no value and the trial judge would rule that the evidence could not be put to the jury. If, however, the trial judge ruled that a jury could find support in the record for the factual assumptions made by the experts, their evidence would be admitted and it would be left to the jury to decide what weight to assign to their opinions. It would remain open to the jury to conclude that the evidentiary record does not justify the factual assumptions that the experts made in arriving at their opinions; in such case, the jury would assign no weight to the expert opinions in reaching its verdict.

[379] Probably the most important factual assumption made by the appellant's experts relates to the size of the blow fly maggots around Lynne Harper's nose and mouth. They assumed that these maggots were about one-sixteenth of an inch, the size given by Dr. Penistan in his autopsy report. We cannot say that a reasonable jury would inevitably accept that Dr. Penistan accurately described the size of the maggots in his autopsy report, or that the available photographs justify the experts' opinion that the maggots in this area were very close to this size. We are satisfied, however, that there is a sufficient

evidentiary basis that the trial judge could leave the opinions of the appellant's experts to the jury to decide what weight they would assign to this evidence.

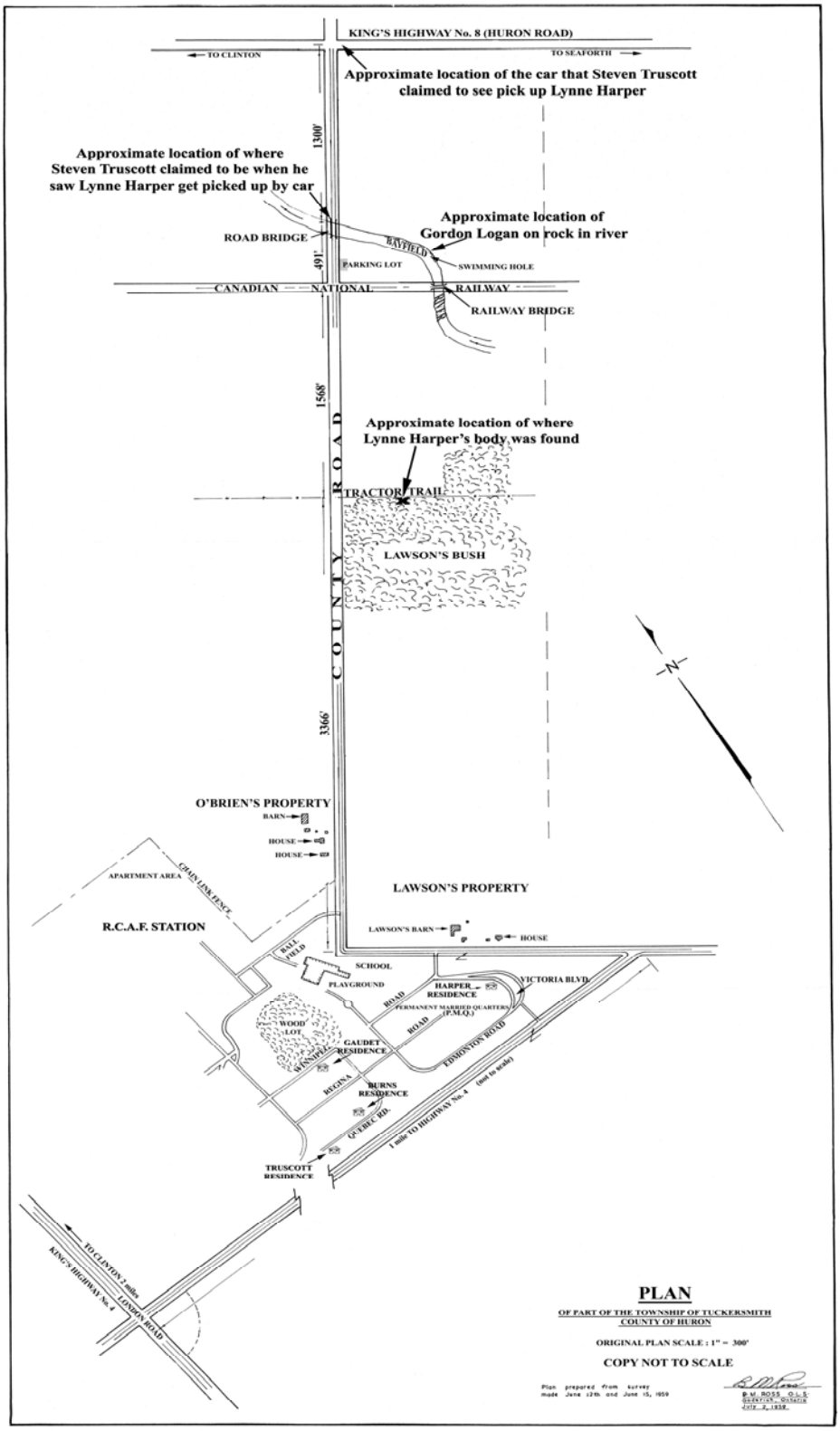
[380] We also think that it would be open to the jury at a new trial to find that the appellant's entomology evidence, together with the pathology evidence that we have discussed in Part III of our reasons, raises a reasonable doubt as to whether Lynne Harper died before 8:00 p.m. on June 9. That doubt would require the acquittal of the appellant. In so holding, we stress that it is not incumbent on the appellant to prove that Lynne Harper probably died after 8:00 p.m., only that death after 8:00 p.m. was a reasonable possibility. We are satisfied that the entomology and the pathology evidence more than meet this standard.

**THE SECOND PILLAR OF THE CROWN'S CASE: THE COUNTY ROAD EVIDENCE**

[381] The County Road evidence consists of evidence, mostly from children, tracking the movements of various people along the County Road on the evening of June 9, 1959 between the hours of 6 and 8 p.m. Appendix 1 is a large, easy to read, map of the County Road and surrounding area. A smaller version of the same map is provided on the next page to assist the reader in understanding our detailed analysis of the County Road evidence.

[382] The approximately one-mile section of the County Road runs north from the school grounds, located at the north-west corner of the Clinton R.C.A.F. Station, to King's Highway No. 8. Lawson's Bush is located immediately east of the County Road between the school grounds and the highway. A trail, referred to by the witnesses as the "tractor trail", runs east from the County Road along the northern edge of Lawson's Bush. About 1500 feet north of the tractor trail, a set of railway tracks crosses the County Road. Approximately 490 feet north of the railway tracks, the County Road bridge spans the Bayfield River.[19] The County Road meets Highway 8 about 1300 feet north of the bridge. Highway 8 runs west towards Clinton and east towards Seaforth.

[19] For the sake of clarity, as noted earlier in our reasons, when we refer to "the bridge", we are referring to the County Road bridge. Another bridge, the railway bridge, lies to the east of the County Road.


KING'S HIGHWAY No. 8 (HURON ROAD)
TO CLINTON
TO SEAFORTH
Approximate location of the car that Steven Truscott claimed to see pick up Lynne Harper
1300'
Approximate location of where Steven Truscott claimed to be when he saw Lynne Harper get picked up by car
Approximate location of Gordon Logan on rock in river
ROAD BRIDGE
RAYFIELD
491'
PARKING LOT
SWIMMING HOLE
CANADIAN NATIONAL RAILWAY
RAILWAY BRIDGE
1568'
Approximate location of where Lynne Harper's body was found
TRACTOR TRAIL
LAWSON'S BUSH
COUNTY ROAD
3366'
N
O'BRIEN'S PROPERTY
BARN
HOUSE
HOUSE
APARTMENT AREA
CHAIN LINK FENCE
LAWSON'S PROPERTY
R.C.A.F. STATION
LAWSON'S BARN
HOUSE
BALL FIELD
SCHOOL
PLAYGROUND
ROAD
HARPER RESIDENCE
VICTORIA BLVD.
PERMANENT MARRIED QUARTERS (P.M.Q.'s)
ROAD
WOOD LOT
GAUDET RESIDENCE
WINNIPEG
EDMONTON ROAD
REGINA
BURNS RESIDENCE
QUEBEC RD.
1 mile TO HIGHWAY No. 4 (not to scale)
TRUSCOTT RESIDENCE
TO CLINTON 7 miles
KING'S HIGHWAY No. 4
LONDON ROAD
PLAN
OF PART OF THE TOWNSHIP OF TUCKERSMITH
COUNTY OF HURON
ORIGINAL PLAN SCALE : 1" = 300'
COPY NOT TO SCALE
Plan prepared from surveys made June 12th and June 15, 1959
B.M. ROSS O.L.S.
GODERICH, ONTARIO
JULY 2, 1959

[383] There are two versions of the County Road evidence. The Crown's version was put forward at trial through a series of witnesses called by the Crown. The appellant's version was put into evidence through several of his statements to the police introduced by the Crown at trial, and through the evidence of three defence witnesses.

[384] On the Crown's version, the appellant and Lynne were seen headed north on the County Road on the appellant's bicycle at around 7:10 p.m. on June 9. Richard Gellatly (age twelve) saw them south of Lawson's Bush. Various Crown witnesses who were on the County Road or at the river testified that they did not see the appellant or Lynne anywhere north of Lawson's Bush. Two of these witnesses were children who said that they were actively looking for the appellant along the County Road and at the river that evening. The Crown invited the jury to infer from this evidence that the appellant and Lynne did not go north of Lawson's Bush on the County Road, but instead went into Lawson's Bush where, according to the Crown, the appellant raped and murdered her. Lynne's body was found in Lawson's Bush almost two days later, on June 11.

[385] On the defence version of the County Road evidence, the appellant, at Lynne's request, gave her a ride on his bicycle to the intersection of the County Road and Highway 8. He let her off and headed back southbound on the County Road. The appellant last saw Lynne a few minutes after he had dropped her off at the intersection. He looked back from the bridge and saw her getting into a car that had stopped to pick her up. The car drove off in an easterly direction towards Seaforth. The defence called three witnesses, Gordon Logan (age thirteen), Doug Oates (age twelve) and Alan Oates

(age sixteen), who lent support to the appellant's statement that he had given Lynne a ride north on the County Road across the bridge and that he had returned to the bridge a few minutes later alone.

[386] It is common ground that if the appellant crossed the bridge and dropped Lynne off at Highway 8, then he is innocent. On the other hand, if he did not cross the bridge with Lynne, but instead took her into Lawson's Bush, then it is a virtual certainty that he killed her.

[387] In this section, we first summarize the County Road evidence adduced at trial by the Crown. We then address how the Supreme Court of Canada treated the County Road evidence in its reasons for upholding the conviction. Lastly, we examine the archival material brought forward by the appellant in these proceedings and consider how this material could be used at a hypothetical new trial.

[388] In the latter exercise, we start with the evidence led by the Crown at trial, complete with the frailties inherent in the Crown's theory as it then stood. We go on to examine the effect of the archival material, both in terms of how it could affect the strength of the Crown's case, and how it could assist the appellant in presenting a viable exculpatory version of the County Road evidence that is consistent with his defence.

[389] At this stage of our reasons, we do not consider the evidence called by the defence at trial in support of its version of the County Road evidence, in particular the evidence of Gordon Logan and Doug Oates. We deal with this evidence, as well as the archival

material that, according to the appellant, strengthens this evidence at paras. 624-667 and 729-733, *infra*.

**1. The Evidence Underlying the Crown's County Road Theory**

[390] The evidence supporting the Crown's County Road theory came from several witnesses who testified at trial. The Crown called no additional evidence on the first Reference in respect of this part of its case. The reasons of the majority of the Supreme Court provide a detailed review of the evidence heard by the jury. Our summary is, for the most part, from those reasons: see *Reference re Truscott, supra*, at pp. 288-293.[20]

**(i) Summary of the Crown's County Road evidence**

[391] Jocelyne Gaudet (age thirteen) was in the same class as Lynne Harper and the appellant. She said that the appellant had spoken to her in class on Monday, June 8 and then again on Tuesday, June 9 and asked her if she wanted him to show her two new born calves in Lawson's Bush. On Tuesday, he told her to meet him on the right-hand side of the County Road "just outside of the fence by the woods"[21] at 6:00 p.m. He told her to keep the plan quiet because Mr. Lawson did not like a bunch of kids on his property.

[392] Gaudet lived on Winnipeg Road, about three blocks away from the Truscott's house. She said that the appellant called at her house at 5:50 p.m. She told him that she

[20] Errors in the spelling of witnesses' names in the trial transcript and in the reasons of the Supreme Court of Canada have been corrected in these reasons.

[21] Gaudet explained that by "woods" she was referring to the bush or woods on the right hand side of the County Road "when you go down towards the bridge."

could not come out at the moment. Gaudet's father said that someone did come to the door at that time, but he did not know who it was.

[393] The appellant's mother said that the appellant arrived home for supper between 5:15 and 5:30 p.m. She sent him to buy coffee from the store at the end of the street. She said the time was close to 6:00 p.m., because there was a need for him to hurry in order to get there before closing time. He bought the coffee and returned home. He went out after supper wearing red pants and a white shirt. His mother told him to be home by 8:30 p.m. because he was needed to babysit his younger siblings.

[394] Several witnesses, including Paul Desjardine (age fourteen), Kenneth Geiger (age eleven), and Robb Harrington (age twelve) recalled seeing the appellant in the area of Lawson's Bush between about 6:10 and 6:45 p.m. on his green racer bicycle. Ken Geiger's mother, Mrs. Beatrice Geiger, testified that she left her house at about 6:10 p.m. to go to the bridge. As she cycled north towards the bridge, the appellant passed her near Lawson's Bush riding his bike. She said that he went as far as the bridge, stopped for a minute or two and then headed south again. She gave the time of this sighting as around 6:25 and 6:30 p.m.

[395] Meanwhile, Lynne Harper had arrived home from school at about 5:30 p.m. and finished her supper by 5:45 p.m. After supper, she left the house briefly to apply for a permit for the swimming pool at the R.C.A.F. Station that evening. She was not given a permit because she did not have an adult to accompany her. Her mother testified that she was resigned, not annoyed, that she could not go swimming. Lynne washed the dishes

and left the house at roughly 6:15 p.m. She went to the school grounds to assist Mrs. Anne Nickerson, a Brownie leader who was conducting a Brownie meeting. Mrs. Nickerson estimated that Lynne arrived at about 6:35 p.m.

[396] Mrs. Nickerson testified that the appellant arrived at the school grounds on his bike shortly before 7:00 p.m. and that Lynne went over to speak to him. After a few minutes, they left together on foot in a northerly direction around the west side of the school with the appellant pushing his bicycle. She put the time at between 7:00 and 7:10 p.m.

[397] Another Brownie leader who was assisting with the meeting, Mrs. Dorothy Bohonus, testified that shortly after she arrived she looked at her watch and it was ten minutes to seven. Lynne was already there. She said that not more than five or ten or at most fifteen minutes later, the appellant appeared and talked to Lynne. She did not say how long they talked and she did not notice them leave.

[398] Another Crown witness, Mrs. Donna Dunkin, testified that on the evening of June 9, she drove on the County Road from the Permanent Married Quarters ("P.M.Q.")[22] to the river and pulled off the road, just north of the railroad tracks, to park. She saw Richard Gellatly (age twelve) riding his bicycle towards the Station just as she pulled off the road. She also saw Philip Burns (age ten), who was walking behind Gellatly. They were between the railway tracks and the bridge (the railway tracks are some 491 feet

[22] The P. M.Q. area is shown on the map in Appendix 1.

south of the bridge). She said that Burns was no more than ten feet behind Gellatly. She estimated that the time of this sighting was between 7:00 or 7:05 and 7:15 p.m.

[399] Richard Gellatly testified that as he rode south on his bike from the bridge to home, he met the appellant with Lynne on his bike riding north on the County Road "about a quarter of the way from O'Brien's farm."[23] He estimated the time of meeting as about 7:25 p.m. The appellant and Lynne were south of Lawson's Bush when he passed them.

[400] Philip Burns (age eleven by the trial) testified that he did not see the appellant or Lynne on his walk home along the County Road. He did meet Jocelyne Gaudet near the south end of Lawson's Bush and had a brief conversation with her. About two minutes later, after walking further south, Burns met Arnold George, who was headed north towards the river behind Gaudet. Philip's older brother, Michael (age fourteen), said that he looked at the clock as Philip got home and it was 7:32 p.m.

[401] Jocelyne Gaudet testified that she left her house at about 6:20 or 6:30 p.m. on June 9 and rode to Lawson's barn to see if the appellant was there, but he was not. She went to their "meeting place", but he was not there either. Following a brief conversation with Philip Burns, she went north to the tractor trail pushing her bicycle. She went three-quarters of the way along the trail and then looked towards the railway bridge. She shouted the appellant's name twice and then looked towards the woods and shouted it

[23] O'Brien's farm is shown on the map on p. 148 and in Appendix 1.

three or four times. After turning her bike around, she saw Arnold George going past the tractor trail entrance. They had a brief conversation and while they were talking, Bryan Glover passed by on the County Road. Glover (age fourteen) confirmed that he saw Gaudet and George speaking with each other. Gaudet went to the bridge, but did not see the appellant at the river. She returned to Lawson's barn at what she estimated was a little before 7:00 p.m. and stayed there for an hour and a half while Mr. Lawson was doing his chores.[24]

[402] Arnold George testified that he also searched for the appellant on the evening of June 9, but could not find him along the County Road or at the river. He confirmed meeting Burns and Gaudet on his trip north along the County Road to the river.

[403] Teunis Vandendool (age fifteen) testified that after supper on June 9, he left his farm on Highway 8 between 7:05 and 7:10 p.m. to go swimming in the river. He went west on Highway 8 and then south down the County Road by bicycle to the river, where he swam for ten or fifteen minutes and then returned home, arriving there at 7:45 p.m. On his way to the river and on his return trip home, he did not see a car or anyone at the corner of the County Road and Highway 8.

[404] Several children testified that the appellant returned to the school grounds at about 8 p.m. or shortly thereafter. None of these witnesses noticed anything unusual about the

[24] The majority of the Supreme Court observed at p. 292 that "[t]here is obviously something very wrong with Jocelyne Gaudet's times", noting that her times did not correspond with those given by Philip Burns, George, Glover and, as is discussed below at para. 422, Mr. Lawson.

appellant's demeanour, conduct or the condition of his clothing.

[405] The appellant's mother testified that he got home between 8:25 and 8:30 p.m. She remembered him saying, "Well, I made it, Mom", to which she replied, "Yep, you are lucky."

**(ii) The cornerstones of the Crown's County Road theory**

[406] The Crown's County Road theory is made up of three cornerstones. We have identified them as:

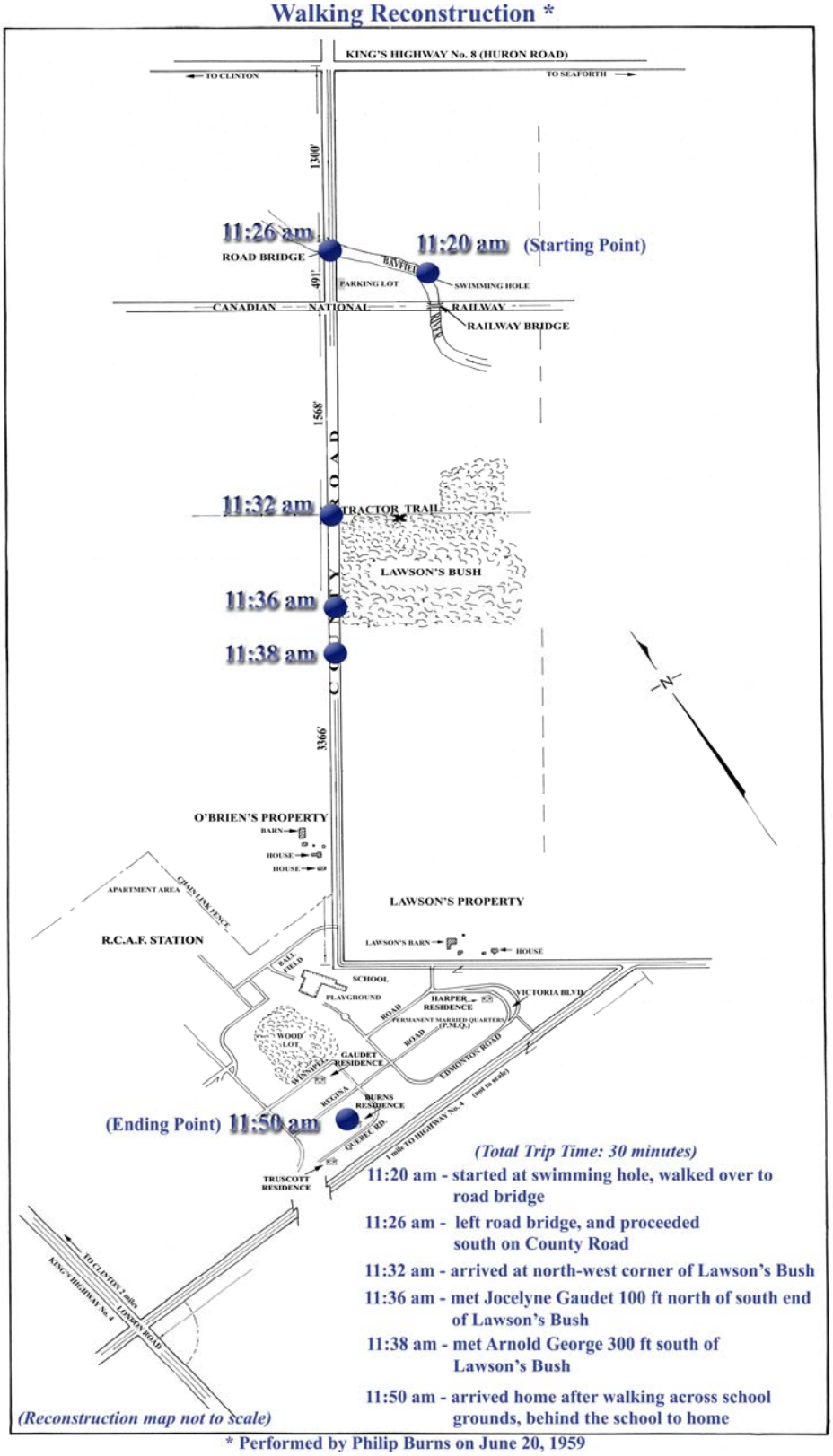
(1) the Burns – Gellatly cornerstone;

(2) the Gaudet – George cornerstone; and

(3) the Teunis Vandendool cornerstone.

[407] An understanding of the evidence supporting the Crown's County Road theory requires an appreciation of the time needed to travel on foot and by bicycle between various locations along the County Road. The Crown at trial recognized this and led evidence of walking and cycling reconstructions that were performed by Philip Burns and Paul Desjardine on June 20, 1959 at the request of the police. Burns was asked to re-enact his movements on June 9, while Desjardine took the route that the appellant told the police he had taken with Lynne Harper. The police timed how long it took Burns to walk and Desjardine to cycle to the various locations. These times, as well as a map showing the approximate locations and the time it took the boys to get to each one, are provided in the following pages and in Appendices 3 and 4.

## Walking Reconstruction *




*(Total Trip Time: 30 minutes)*

11:20 am - started at swimming hole, walked over to road bridge

11:26 am - left road bridge, and proceeded south on County Road

11:32 am - arrived at north-west corner of Lawson's Bush

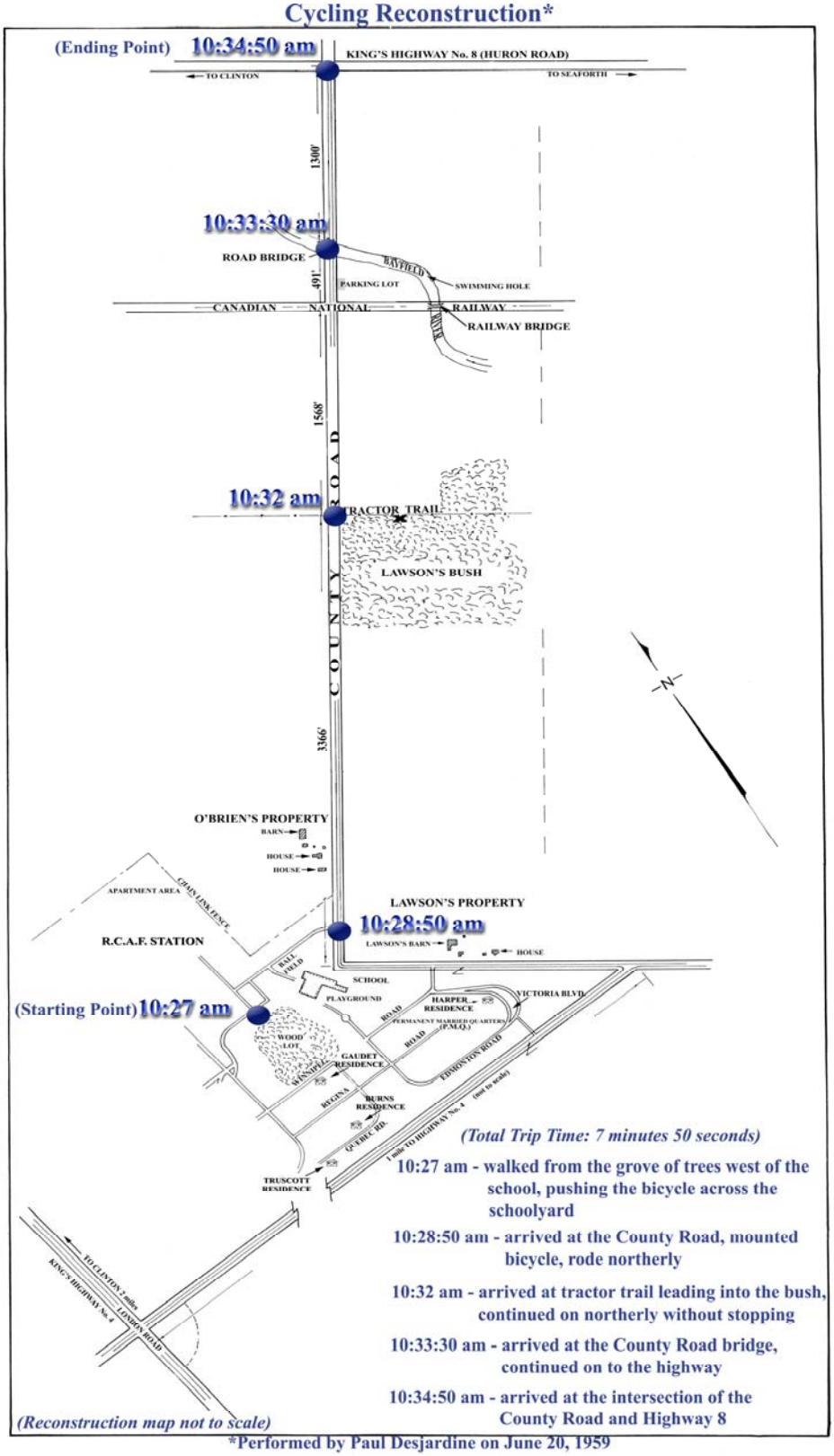
11:36 am - met Jocelyne Gaudet 100 ft north of south end of Lawson's Bush

11:38 am - met Arnold George 300 ft south of Lawson's Bush

11:50 am - arrived home after walking across school grounds, behind the school to home

* Performed by Philip Burns on June 20, 1959

## Cycling Reconstruction*




*(Total Trip Time: 7 minutes 50 seconds)*

10:27 am - walked from the grove of trees west of the school, pushing the bicycle across the schoolyard

10:28:50 am - arrived at the County Road, mounted bicycle, rode northerly

10:32 am - arrived at tractor trail leading into the bush, continued on northerly without stopping

10:33:30 am - arrived at the County Road bridge, continued on to the highway

10:34:50 am - arrived at the intersection of the County Road and Highway 8

*Performed by Paul Desjardine on June 20, 1959

**(1) The Burns–Gellatly cornerstone**

[408] The Burns–Gellatly cornerstone of the Crown's County Road theory rests primarily on the evidence of two adult witnesses, Mrs. Dunkin and Mrs. Nickerson. Of particular significance is their description of two separate events that occurred at opposite ends of the County Road, one at the bridge and the other at the school grounds.

**The event at the bridge**

[409] The event at the bridge centres on Mrs. Dunkin's observations of Richard Gellatly and Philip Burns as they left the area of the bridge (on her estimate at between 7:00 or 7:05 and 7:15 p.m.) and headed south towards the Station. At issue is the accuracy of her recollection that the boys left in tandem, with Gellatly on his bicycle and Burns ten feet behind on foot. If the boys did leave in tandem, as she claimed, then the first half of the cornerstone is intact. If, however, Gellatly did not leave the area of the bridge for home at the same time as Burns, but about fifteen or twenty minutes later, then the Burns–Gellatly cornerstone collapses.

**The event at the school grounds**

[410] The event at the school grounds that is needed to complete the Burns–Gellatly cornerstone centres on Mrs. Nickerson's estimate of the time when Lynne and the appellant left the school grounds and headed north on the County Road towards the bridge. If, as she claimed, they left between 7:00 and 7:10 p.m., then the second half of the Burns–Gellatly cornerstone is complete. If, however, they left after 7:20 p.m., then the Burns–Gellatly cornerstone collapses.

**The essence of the Burns–Gellatly cornerstone**

[411] In its essence, the Burns–Gellatly cornerstone comes down to a simple deduction. If Burns and Gellatly left together from the area of the bridge with Gellatly on his bike and Burns on foot, and if Gellatly passed the appellant and Lynne at a point south of Lawson's Bush as the pair headed north on the County Road towards the bridge, then, if the appellant and Lynne had continued to the bridge and beyond as the appellant claimed, Burns would have had to have seen them as he walked south towards the Station. He did not. Hence, before meeting Burns, the appellant must have turned off the County Road onto the tractor trail and taken Lynne into Lawson's Bush to her death.

[412] The cogency of this scenario depends on Burns and Gellatly having left the area of the bridge at the same time, at approximately 7:00 to 7:10 p.m., and the appellant having come onto the County Road with Lynne a minute or two later. That timing would explain why Gellatly had reached the southern end of the roughly one-mile section of the County Road when he encountered them. That timing would also explain why Burns arrived home at 7:32 p.m., according to the evidence of his brother. (The cycling reconstruction suggests that it would take about three minutes to cycle from the bridge to where Gellatly encountered the appellant and Lynne on the County Road. Thus, to meet Gellatly where they did, the appellant and Lynne must have started to bicycle north on the County Road within about two or three minutes of Gellatly leaving the bridge: see Appendix 4. The walking reconstruction indicates that it took Burns twenty-four minutes to walk from the bridge to his home in the Station: see Appendix 3).

[413] The Crown gained support for its Burns–Gellatly cornerstone from several witnesses. At the Dunkin end of the line, Mrs. Geiger provided limited confirmation of Mrs. Dunkin's evidence that she saw Burns and Gellatly leave the area of the bridge in tandem. Mrs. Geiger testified that on the evening of June 9 when she was near the bridge on the north side of the river watching her children swim, she overheard Philip Burns asking for the time, which was supplied by Sgt. McCafferty. She recalled it as being about 7:00 p.m. She then saw Burns leave "from the south side of the river about the same time Richard Gellatly left the north side, walking up the north side." She fixed their mutual departure times from the river at around 7:10 to 7:15 p.m.

[414] At the Nickerson end of the line, one adult and one child provided limited confirmation of Mrs. Nickerson's evidence that the appellant and Lynne left the school grounds between 7:00 and 7:10 p.m. Mrs. Nickerson's assistant at the Brownie meeting, Mrs. Bohonus, said that the appellant showed up between 6:55 p.m. and "very shortly after 7:00 p.m." She noticed that he and Lynne were talking, but she did not see them leave. Warren Hatherall (age twelve) testified that he saw the appellant and Lynne walking towards the County Road at "about 7 o'clock".

**(2) The Gaudet–George cornerstone**

[415] The Gaudet–George cornerstone rests primarily on the evidence of Jocelyne Gaudet and Arnold George, classmates of the appellant who testified about their efforts to find him on the evening in question. Without going into the details of the relevant trial testimony, it seems that in or around 7:15 to 7:30 p.m., Gaudet and George were

searching for the appellant along the County Road, particularly in the area around Lawson's Bush and the area of the bridge. Despite their best efforts, neither could locate him.

[416] According to the Crown, the inability of Gaudet and George to find the appellant belied his claim that he had taken Lynne to Highway 8 and returned alone to the bridge before heading back to the school grounds. Were that true, one of them would surely have seen him, especially since he was wearing red pants and riding his distinctive green bicycle. Gaudet's and George's testimony proved that the appellant's story must be false, regardless of the time that he may have left the school grounds with Lynne, be it 7:00 to 7:10 p.m. as Mrs. Nickerson claimed, or after 7:20 p.m. as he claimed.

[417] In other words, it mattered not whether the appellant and Lynne went onto the County Road just ahead of Gaudet and George or just behind them. Either way, given the fact that they were actively searching the road for him, particularly in the area from Lawson's Bush to the bridge, they would have found him if he were anywhere in the vicinity. But he was not to be found, the Crown maintained, because he did not take Lynne to Highway 8 at all; rather, he took her along the tractor trail and into Lawson's Bush to her death.

[418] The Crown gained support for this cornerstone from two children and one adult witness. Philip Burns (the young boy who, according to Mrs. Dunkin, left the area of the bridge in tandem with Richard Gellatly) testified that on his walk home he encountered

Jocelyne Gaudet near the south corner of Lawson's Bush. During the walking reconstruction that Burns performed for the police, he indicated that the point where he met Gaudet was about 100 feet north of the south end of Lawson's Bush. Burns testified that Gaudet was headed towards the river and that he chatted briefly with her. Although Burns said that she was on her bicycle at the time, Gaudet testified that she was walking her bike when she met Burns and that she continued walking towards the river.

[419] Burns testified that about fifty yards south of the corner of Lawson's Bush, he ran into George, who was on his bicycle riding north towards the river. During the walking reconstruction, Burns indicated to police that the point where he met George was about 400 feet south of the point where he had encountered Gaudet. Burns then continued to walk south towards his home, while George rode north on his bicycle towards the river.

[420] Bryan Glover, a grade eight student and an acquaintance of the appellant and Lynne, testified that on the evening of June 9, between 7:00 and 7:10 p.m., he and his friend Thomas Gillette cycled from the bridge to their homes in the Station to pick up their fishing rods. On the way, they did not see the appellant and Lynne, nor did they see Gaudet or George.

[421] Glover returned to the bridge alone on his bike. He testified that he left his house at about 7:20 or 7:25 p.m. and, as he proceeded north along the County Road, he saw Jocelyne Gaudet with Arnold George at the tractor trail. Glover did not stop or talk to them, but continued towards the river. He testified that George arrived at the bridge

about a minute or two later. Glover's testimony confirmed the evidence of George and Gaudet, in that on his return trip to the bridge, he too did not see the appellant or Lynne. Glover also confirmed their evidence of having met each other at the tractor trail during their search for the appellant.

[422] Robert Lawson testified that on the evening of June 9 at about 7:10 or 7:15 p.m., Gaudet showed up at his farm looking for the appellant. According to Mr. Lawson, Gaudet left at 7:25 p.m. "to go back to the bush." Twenty or thirty minutes later, *i.e.*, between 7:45 and 7:55 p.m., she returned to the barn and stayed for approximately ten minutes. Mr. Lawson's evidence assisted the Crown by confirming that Gaudet was in fact looking for the appellant that evening and that she left the barn in search of him at 7:25 p.m.

**(3) The Teunis Vandendool cornerstone**

[423] As we have noted, Teunis Vandendool testified that on the evening of June 9, he cycled from his home on Highway 8, a mile or so east of the County Road, to the river and arrived at the bridge at about 7:15 to 7:20 p.m. He swam for ten or fifteen minutes, got dressed, and then started to bike home at around 7:30 to 7:35 p.m. He arrived back home at 7:45 p.m.

[424] Vandendool denied seeing any person or vehicle at the intersection of the County Road and Highway 8 during his travels. As such, his evidence lent some support to the Crown's position that the appellant did not drop Lynne off at Highway 8 where she was soon picked up by a car.

**2. The Treatment of the County Road Evidence by the Majority of the Supreme Court on the First Reference**

[425] Before assessing the numerous archival documents that the appellant asks us to consider in relation to the Crown's County Road evidence, we find it instructive to look at how the majority of the Supreme Court viewed the County Road evidence that was led by the Crown and the defence at trial, and particularly at how decisive a role they felt this evidence must have played with the jury.

[426] In concluding that they would have dismissed the appellant's appeal from conviction, the majority referred to the County Road evidence at p. 295 of their reasons in these terms:

> This conflict between evidence pointing to a disappearance into Lawson's bush and evidence asserting that Steven Truscott had crossed the bridge with Lynne Harper on his way to the highway and had returned alone, *was the critical issue in this case and it was entirely a jury problem. The Judge's instruction to the jury on the issue was emphatic and clear*:
>
> > "Now then, it is the theory of the Defence, and they brought evidence to show that, as I say this little Douglas Oates saw them going across the bridge and then, in a few minutes, according to the boy by the name of Gordon Logan – Gordon Logan also says he saw them going north on the bridge and in about five minutes he says he saw Steven return alone. Well, as regards Gordon Logan, it will be for you Gentlemen to say whether you believe his evidence, and it is very important, Gentlemen, because if you believe the Defence theory of this matter and believe Steven's statement to the police and to other people, that the girl was driven to Number Eight

> Highway and entered an automobile which went east; it is my view that you must acquit the boy if you believe that story.
>
> *In other words, I will put it this way. In order to convict this boy, you have to completely reject that story as having no truth in it, as not being true. You have to completely reject that story*." [Emphasis added.]

[427] The majority then outlined some of the more salient features of the evidence, both at trial and on the Reference. They returned to the significance of the County Road evidence at pp. 301-2:

> The body of Lynne Harper was found on Thursday, June 11, 1959, at 1:45 p.m., in Lawson's bush some distance in from the tractor trail. The evidence strongly pointed to this as the place where she was raped and murdered. *We have already quoted from the instruction of the trial Judge to the effect that the jury could not convict unless the jury entirely rejected the evidence of Douglas Oates and Gordon Logan that they saw Truscott on the bridge with Lynne Harper on their way to the highway intersection. All the evidence, including the medical evidence, has to be related to this critical issue*.
>
> An outline of the problem facing the jury at the trial seems to be this. First of all, they had the time of departure from the school grounds fixed with reasonable certainty by the evidence of Mrs. Nickerson and Mrs. Bohonus at not later than 7:15 p.m. Then, on his own admission, Truscott met Richard Gellatly between the school yard and Lawson's bush. He did not meet Philip Burns as he should have done if he had continued on his way to the highway. He was not seen by Jocelyne Gaudet and Arnold George as he would have been if he had continued on to the highway and had returned alone from the intersection to the bridge. *The jury's conclusion must have been that after passing Richard Gellatly and before Philip Burns, Jocelyne Gaudet and Arnold George had an opportunity to see him, he had disappeared with the girl into Lawson's bush.*

> *Before they could come to this conclusion the jury had to reject the evidence of Douglas Oates and Gordon Logan and they must have done so with the emphatic warning of the trial Judge in their minds*. [Emphasis added.]

[428] Finally, after reviewing the great mass of conflicting medical evidence pertaining to the time of Lynne Harper's death as presented at trial and on the Reference, the majority again returned to the significance of the County Road evidence and the "decisive" role it must have played with the jury in shaping the outcome of the case (at pp. 342-43):

> Again we say that this opinion evidence must be related to all the other evidence. We have the known facts of the meal, the time when she finished, that she was in the school grounds engaged in normal activity after the meal and before she started down the road. We have the time when she started down the road and it was not later than 7:15 p.m., not 7:30 as Truscott said. She was found 42 hours later in a bush off the road at 1:45 p.m. on Thursday, June 11, 1959. *The jury's verdict must have rejected Dr. Brown's time of three or four hours after the meal because it contained no possibility of accuracy in relation to this case if they came to the conclusion that Truscott did not take the girl to the intersection*.
>
> We are faced with the same problem. No new issues were raised before us but there was a great volume of new evidence. The weight of the new evidence supports Dr. Penistan's opinion. *But the decisive point in this case is still the one put to the jury by the trial Judge and decided against the accused*. [Emphasis added.]

[429] There can be no doubt about the significance that the majority of the Supreme Court of Canada attached to the County Road evidence. In the majority's view, the evidence played a decisive role in the jury's verdict. The significance that the majority

attached to this evidence becomes a yardstick that assists in measuring the potential importance of the archival material relied on by the appellant in these proceedings to challenge the Crown's County Road theory and to support his version of that evidence.

**3. The Archival Material and its Impact on the Crown's County Road Evidence**

**(i) The nature of the archival material**

[430] The nature of the County Road evidence must be borne in mind when considering the impact that the archival material could have at a hypothetical new trial. The County Road evidence is circumstantial and detailed, if not intricate. Its value to the Crown depends on whether a number of small pieces of information fit together to point the incriminatory finger in the way the Crown alleged. What might appear in isolation to be a small detail in the testimony of a witness, or a relatively insignificant inconsistency in statements made by a particular witness, could have a significant impact on the overall plausibility of the Crown's County Road theory.

[431] For example, there are many references to the times at which different people did different things and saw or did not see other people along the County Road. Some of the time differences between witnesses are very small. Time variations among witnesses, especially children, are hardly unexpected, and in most cases would not undermine the reliability of the witness' evidence. However, by its nature, the County Road evidence is such that differences of a few minutes can have a radical effect on the viability of the conflicting theories advanced by the Crown and defence. In other words, small time differences can matter significantly in this case. Some of the evidence given by various

witnesses concerning times is clearly more reliable than evidence on times given by other witnesses. The inability to reconcile some of the times provided by various witnesses with the times that appear to be more accurate, for instance, times where the witness recalled checking a watch or a clock, is a factor that we consider in assessing the significance of the archival material brought forward by the appellant.

[432] Insofar as the County Road evidence is concerned, the archival documents include a group of formal witness statements made to the police by various civilian witnesses, some of whom testified at trial and some of whom did not. Some of these formal statements were signed and witnessed and some were not.

[433] The archival documents also include what appear to be summaries of conversations with witnesses in police officers' notebooks. These summaries are generally brief and appear to contain what the officer considered to be the salient information provided by the individual. These notes refer to conversations with witnesses that generally occurred either shortly after Lynne's disappearance or not long after the discovery of her body two days later, before the witness gave a formal statement. In the course of these reasons, we refer to these notes as statements.[25]

[434] We appreciate, however, that in the context of a hypothetical new trial, the formal statements could well be of greater assistance to counsel than the more cryptic officers'

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[25] The archival material presented by the appellant includes a third grouping of "will-say" materials. These are "will-say" statements prepared by investigating officers, which relate to statements the appellant made to the officers following Lynne's disappearance and prior to his arrest on June 12. These statements add little, if anything, to the County Road evidence.

notes of conversations with witnesses. We are nevertheless satisfied that the officers' notes could assist the defence in at least two ways. First, they could provide information upon which the maker of the statement or other witnesses could be questioned. Second, they could provide counsel with a means of refreshing a witness' memory, thereby potentially causing a witness to modify his or her evidence.

**(ii) Difficulties inherent in the Crown's County Road theory as presented at trial**

[435] The impact of the archival material on the Crown's County Road theory cannot be considered apart from the relative strengths and weaknesses of that theory as presented at trial. Viewed macroscopically, the Crown's County Road theory presented a straightforward, powerful case against the appellant. The Crown's case was grounded in the symmetric evidence of Mrs. Dunkin and Mrs. Nickerson, two adult witnesses whose credibility was seemingly beyond question, and the mutually corroborative evidence of Gaudet, George, Burns, Vandendool and Mr. Lawson. On this narrative, how could Burns have missed the appellant in his red pants riding double with Lynne on his distinctive green bicycle if the appellant had actually continued north on the County Road to the bridge after passing Gellatly? Even more tellingly, how could both Gaudet and George, who were looking for the appellant at the same time, have failed to find him if in fact he was on the County Road north of Lawson's Bush and at the bridge? Their inability to locate the appellant admitted of only one explanation: he could not be found because he had turned off the County Road down the tractor trail and had taken Lynne into Lawson's Bush.

[436] While the Crown's County Road theory appears powerful when examined from a distance, closer scrutiny reveals a number of incongruities and improbabilities in that theory. The potential probative value of the archival material at a hypothetical new trial can only be understood when the inconsistencies and difficulties with the Crown's County Road evidence as presented at trial are fully understood. We turn to those difficulties.

[437] The Crown's County Road evidence sought to prove two primary facts:

- the appellant and Lynne were seen on the County Road south of Lawson's Bush heading north towards the highway at about 7:15 p.m.; and
- the appellant and Lynne were not seen anywhere north of Lawson's Bush on the County Road between 7:15 and 7:45 p.m.[26]

[438] Given that none of the Crown witnesses saw the appellant with Lynne north of Lawson's Bush, the Crown asked the jury to infer that the appellant had not taken her north of the bush. The Crown asked the jury to draw the further inference that the appellant turned off the County Road with Lynne and took her into Lawson's Bush. If the jury drew these two inferences and if it accepted Dr. Penistan's opinion on the time of Lynne Harper's death, the appellant's conviction was only a short and easy inference away. Lynne was murdered in Lawson's Bush before 8 p.m. on June 9 at the location where her body was found.

[26] This time frame corresponded with Dr. Penistan's opinion that Lynne Harper was dead by 7:45 p.m. on June 9.

[439] Reduced to the inferences that the Crown sought the jury to draw, the Crown's County Road evidence presented a powerful case for guilt. However, a significant weakness in the Crown's County Road evidence lies in the fact that the same line of reasoning that the Crown relied on to convince the jury that the appellant did not go north of Lawson's Bush with Lynne could have been used by the jury to reject the Crown's own theory. As outlined above, the Crown urged the jury to find that several people who were on the County Road north of Lawson's Bush did not see the appellant and to infer from this fact the further fact that the appellant did not go north of Lawson's Bush with Lynne.

[440] The submission that the jury should draw the inference that the appellant was not in a certain place because he was not seen there by others who were in that place is, of course, a legitimate line of reasoning. The point we make here, however, is that it was equally open to the defence to argue that the same inference could be used against the Crown. Several links in the Crown's County Road chain of evidence were open to serious challenge if the jury drew the kind of inference that the Crown relied on to make its case against the appellant. We consider four such instances that are evident on a close reading of the trial record:

- On the Crown's theory, Philip Burns and Richard Gellatly headed south on the County Road from the area of the bridge a short distance apart, with Burns on foot about ten feet behind Gellatly on his bike. There was no evidence at trial that either saw the other. Indeed, Burns testified that he did not see Gellatly at all after he left the river. On the Crown's reasoning, the jury could draw the inference that Burns and Gellatly did not leave in tandem, but rather that they made their way home at different times.

- On Burns' evidence, he should have been very close to the tractor trail when, on the Crown's theory, the appellant and Lynne reached the trail and turned down it. In particular, Burns should have passed by the tractor trail very shortly after the appellant and Lynne started down that trail. However, Burns did not see either the appellant or Lynne. Using the Crown's analysis, the jury could infer from the fact that Burns did not see the appellant and Lynne that they were not on the tractor trail at the time the Crown alleged.

- Gellatly testified that after he passed the appellant and Lynne on the County Road, he continued home, changed his clothing and cycled back along the County Road to the bridge within about ten minutes. According to Gellatly, he did not see Burns, Gaudet or George on his return trip. Yet, if Gellatly and Burns left the area of the bridge in tandem with Gellatly on his bike and Burns on foot, Burns would still have been on the County Road walking home when Gellatly made his return trip to the swimming hole. Why, then, did Burns and Gellatly not see each other on Gellatly's return trip? Also, on the Crown's theory of Gaudet's movements, why did Gaudet and Gellatly not see each other as Gellatly cycled back to the bridge? Similarly, why did George, who on the Crown's theory was coming up the road behind Gaudet, not see Gellatly or Gellatly see George as Gellatly cycled back to the bridge?

- Jocelyne Gaudet testified that when she got to the tractor trail, she walked down it looking for the appellant at a time when on the Crown's theory he and Lynne were a very short distance away in Lawson's Bush. Why did Gaudet not see or hear anyone, or at the very least, not see the appellant's distinctive bicycle, which, on the Crown's theory, must have been somewhere on or near the trail? Gaudet's failure to see either Lynne or the appellant or the appellant's bicycle would, on the Crown's approach to inference-drawing, lead to the conclusion that the appellant, Lynne and his bicycle were not on or near the tractor trail.

[441] Apart from the inferences that could be drawn against the Crown from the evidence of what its own witnesses did not see, there were also "timing problems" with the Crown's County Road evidence. These problems are apparent only on a careful review of the evidence.

[442] Several of the timing problems arise from the evidence of Richard Gellatly, who was generally regarded as a credible and reliable witness. The following are the most significant of these timing problems:

- Gellatly testified that he saw the appellant and Lynne at about 7:25 p.m. headed north on the County Road south of Lawson's Bush. Burns' brother, Michael, testified that he looked at the clock when Philip arrived home and it was 7:32 p.m. On the Crown's theory, Philip was coming south on the County Road, having left the area of the bridge for home on foot just behind Gellatly on his bike. At least one of the times given by Michael Burns and Gellatly would have to be wrong for the Crown's theory to work because Philip Burns could not have walked fast enough to be home so quickly if he left the area of the bridge no more than ten feet behind Gellatly: see Appendices 3 and 4 for the relevant timing evidence.
- Gellatly's evidence that he met the appellant and Lynne at 7:25 p.m. is also inconsistent with the evidence of the Crown witness Mrs. Nickerson. On her evidence, the appellant and Lynne left the school at between 7:00 and 7:10 p.m. If that evidence is correct, Lynne and the appellant would have reached the point south of Lawson's Bush where they passed Gellatly well before 7:25 p.m.

[443] The Crown sought to resolve the inconsistencies arising from Gellatly's evidence by suggesting that he was wrong about the time he encountered the appellant and Lynne. While it was certainly open to a jury to accept this submission, it is noteworthy that Gellatly's evidence concerning the time he met the appellant and Lynne is more consistent with the appellant's version of the County Road evidence, which is discussed further below.

[444] There were also significant inconsistencies on material matters in the evidence given by various Crown witnesses. For example, consider and compare the evidence given by Gaudet and Burns:

- Gaudet testified that she met Burns at the south end of Lawson's Bush. She was walking her bicycle northbound on the County Road and continued to the tractor trail. Gaudet said that she then turned down the tractor trail to look for the appellant. According to her, she went up and down that trail, a distance of about 600 feet in total. Just as she was about to return to the County Road, she met up with Arnold George, who was cycling north.

- Burns testified that after briefly speaking with Gaudet, he encountered Arnold George, who was riding his bicycle north towards the river. He indicated to the police that he met George on the County Road about 400 feet south of where he had met Gaudet.

- On Burns' evidence, George should have been a very short distance behind Gaudet and should have been gaining on her as he was riding his bike and she was walking hers. It is difficult to understand how George would not have overtaken Gaudet before he travelled the distance to the tractor trail. However, on Gaudet's evidence, she did not see George until she got to the tractor trail and walked up and down the tractor trail looking for the appellant. If Burns' evidence is correct, George would have cycled well past the tractor trail by the time Gaudet had gone up and down that trail looking for the appellant. Thus, unless George stopped somewhere between his encounter with Burns and reaching the tractor trail - and there is no evidence that he did - Burns' description of the timing of his encounter with Gaudet and George is irreconcilable with Gaudet's evidence of the timing of her encounter with George.

[445] These difficulties with the Crown's theory, however, can only advance the appellant's defence so far. The frailties in the Crown's version of the County Road evidence do not provide the appellant with a credible alternative theory that is consistent with the available evidence and with his version of events. And here, claims the appellant, is where the archival material fits in. He submits that, taken as a whole, the archival material casts significant further doubt on the Crown's theory and provides him with the material needed to put forward, for the first time, a credible alternative theory that conforms to the circumstantial evidence and supports his innocence.

**(iii) The impact of the archival material on the cornerstones of the Crown's County Road theory at a hypothetical new trial**

**(a) Impact of the archival material on the Burns−Gellatly cornerstone**

[446] We begin this part of our analysis with the first half of the Burns−Gellatly cornerstone, namely, the evidence of Mrs. Dunkin that Burns and Gellatly left from the area of the bridge in tandem, approximately ten feet apart, with Gellatly on his bicycle and Burns about ten feet behind on foot, between 7:00 or 7:05 and 7:15 p.m. At a hypothetical new trial, evidence located in the archives could be used to challenge Mrs. Dunkin's testimony on this crucial point in a number of ways.

[447] In her original statement to the police, dated June 15 (six days after the events in question) and recorded as a brief note in Inspector Graham's handwriting, Mrs. Dunkin made no mention of having seen Burns or Gellatly on the evening of June 9. It was not until her second statement, dated June 20 (eleven days after the events in question), that she mentioned seeing Burns and Gellatly leaving the area of the bridge together. At a hypothetical new trial, this discrepancy could be put to her in cross-examination with a view to establishing how and under what circumstances she had come to remember such a seemingly insignificant event eleven days later.

[448] Gary Geiger (age ten) and Chris Higgins (age nine) were with Mrs. Dunkin on the evening of June 9 when she drove to the bridge. Neither boy testified at trial. However, both gave statements to the police, Geiger on June 19 and Higgins on July 22. In Geiger's statement, he said that he left home in Mrs. Dunkin's car with her two sons and

Chris Higgins at about 7:00 or 7:05 p.m. and went straight to the bridge. He did not see anyone but Philip Burns, who was "walking about the railroad track." We note that Gary Geiger knew Richard Gellatly, but made no reference to seeing him. In Chris Higgins' statement, he recalled seeing Burns walking towards the Station on the County Road near the railroad track. He did not mention seeing Gellatly.

[449] The information contained in these statements could be put to Mrs. Dunkin with a view to testing the accuracy and firmness of her recollection that Burns and Gellatly left from the bridge in tandem. At a hypothetical new trial, the content of the statements could be used to attempt to undermine the accuracy of Mrs. Dunkin's observations. As well, the defence would be alerted to two potential witnesses who could provide important evidence differing from that of Mrs. Dunkin on this crucial point.

[450] Mrs. Geiger testified at trial that she saw Burns and Gellatly leave the area of the river at about the same time as each other. The Crown relied on that aspect of her testimony as circumstantial support for Mrs. Dunkin's "in tandem" observations.

[451] However, in Mrs. Geiger's June 15 statement to the police, she made no mention of seeing Burns and Gellatly leaving together. Indeed, she made no mention of seeing Burns leave at all. She did recall that after Gellatly arrived, he stayed around for five to ten minutes before leaving for "home to get permission from his mother to go swimming." Knowing the content of that statement, defence counsel could cross-examine Mrs. Geiger at a hypothetical new trial about her failure to include her

observation of Burns leaving the river at the same time as Gellatly and how, when and under what circumstances she had come to remember that event.

[452] Robb Harrington (age twelve) testified at trial about seeing the appellant on the County Road at 6:45 p.m. on the evening in question, as he and Ken Geiger rode double on Geiger's bicycle to the bridge. In his testimony, he mentioned seeing Mrs. Geiger at the bridge while he was there (from approximately 6:50 to 7:50 p.m.), but he said nothing more about her activities.

[453] In his June 29 statement to the police, Harrington described in some detail the comings and goings of various people at the river. Importantly, he remembered that Burns was at the river when he arrived. He also recalled Mrs. Geiger's arrival at the river some time later. He said that after that, Gordon Logan and Richard Gellatly "came along". Gordon had his bathing suit but "Richard hadn't so he went home on his bicycle for it. *Before they [Logan and Gellatly] came, Philip Burns swam over to the south bank, put on his running shoes and left.*"

[454] At a hypothetical new trial, the content of that statement could be used to contradict Mrs. Geiger and to establish through Harrington that Burns had already left the river by the time Gellatly arrived. The defence could use this information, combined with Mrs. Geiger's additional comment in her June 15 statement that after Gellatly arrived he stayed for five or ten minutes before returning home to seek permission to

swim, to put a significant gap between Burns' and Gellatly's departure times from the river.

[455] Richard Gellatly also provided two statements to the police, one on June 12 and one on June 13, which the appellant might use to rehabilitate Gellatly's trial testimony that he passed Lynne and the appellant at 7:25 p.m. and to counter the Crown's suggestion that this meeting must have occurred earlier, between 7:05 and 7:15 p.m. In his June 12 statement, Gellatly indicated that from the time he had seen "Steve and Lynne and until I got home and got my bathing suit and got back on to the County Road, it would take about five minutes." In his June 13 statement, he said that he was back at the river by about 7:35 p.m. and that it would only have taken about five minutes to ride from his house to the bridge.

[456] The combination of these statements suggests that Gellatly's estimate that he passed the appellant and Lynne at 7:25 p.m. was more likely to be accurate than the 7:05 to 7:15 p.m. time frame suggested by the Crown.

[457] In summary, the viability of the Crown's County Road theory depended on Burns and Gellatly leaving the area of the bridge in tandem between 7:00 and 7:10 p.m. travelling south towards the Station. If they did not do so, the Crown's theory was not tenable. For the reasons set out above, the archival material provides significant ammunition that could be used at a hypothetical new trial to try to uncouple Burns from Gellatly as they departed from the area of the bridge on their way south on the County

Road. To the extent that the material could achieve that uncoupling, it would put in doubt Mrs. Dunkin's assertion that the two left the bridge in tandem heading south on the County Road.

[458] The archival material could also be used to challenge the second half of the Burns–Gellatly cornerstone, namely, Mrs. Nickerson's testimony that Lynne and the appellant left the school grounds between and 7:00 and 7:10 p.m. In Mrs. Nickerson's original statement to the police dated June 13, she stated that on the evening of June 9, Lynne was at the school grounds and that at about 6:40 p.m., she and Lynne sat down under a tree and spoke for about twenty minutes. At "about five after seven Lynne walked away, and then a boy [the appellant] came along …. He had a bike and parked it, and Lynne sat on the side …. They walked away together towards J Block,[27] him pushing the bike. When it came time to feed the girls about 8 o'clock Lynne was not there."

[459] Two significant matters arise from this statement. First, in her trial testimony, Mrs. Nickerson stated that the appellant arrived "at about a few minutes to seven." In her statement, she made no mention of his arrival time. She did state, however, that she and Lynne parted company at 7:05 p.m. and that it was only after this that the appellant "came along." If the information she provided in this statement were put to her in cross-examination at a hypothetical new trial, she might well agree with a suggestion by defence counsel that her trial times were out by about ten minutes and that it could easily

[27] J Block was west of the school grounds.

have been closer to 7:20 p.m. when the appellant and Lynne began walking away towards J Block.

[460] Second, in her statement, unlike her trial testimony, Mrs. Nickerson did not mention a range of times or indeed any time as to when the appellant and Lynne began to walk away. She said only that she knew Lynne was not there at 8:00 p.m. Once again, at a hypothetical new trial, she could be cross-examined with a view to showing that she simply did not know at what time the appellant and Lynne walked away, and that it could just as easily have been around 7:20 as between 7:00 to 7:10 p.m.

[461] Given the appellant's position that he did not leave the school grounds until after 7:20 p.m., and given the significance of Mrs. Nickerson's evidence to the Burns−Gellatly cornerstone, it was important that the appellant be able to cast doubt on the accuracy of her evidence. As it was, at trial and on the 1966 Reference, Mrs. Nickerson's evidence was treated as though it were sacrosanct and it was taken as a virtual certainty that the appellant must have left the school grounds by 7:10 p.m.

[462] The only other witness at trial who provided a time estimate as to when the appellant and Lynne left from the school grounds was Warren Hatherall (age twelve). According to Hatherall, it was "about 7 o'clock" when he saw the appellant and Lynne walking towards the County Road.

[463] In his original statement to the police on June 12, Hatherall made no mention of the time that he saw the appellant and Lynne walking towards the County Road. He did

say that the appellant came back to the school about fifteen minutes after seeing him leave. The next day, he gave another statement in which he then mentioned the 7:00 p.m. departure time. In the same statement, for reasons unknown, he increased his estimate of the appellant's return time to up to half an hour.

[464] With the knowledge of Hatherall's original statement, as well as the statements of other boys who were at the school grounds at the time (as discussed immediately below), at a hypothetical new trial, defence counsel could cross-examine Hatherall with a view to showing that his 7 p.m. time estimate was little more than a guess, or even better for the appellant, that it was probably after 7:20 p.m. when he saw the appellant and Lynne walking towards the County Road.

[465] Stuart Westie (age twelve) also testified for the Crown at trial. He was playing baseball at the school grounds with Hatherall and others when the appellant and Lynne walked by, heading towards the County Road. When asked what time he saw them, he could do no better than to say that it was somewhere between 7 and 9 p.m.

[466] In his original statement to the police on June 13, Westie stated that he had seen "Steve and Lynne about 7:30, but I would allow twenty minutes either way." Based on the information in that statement, he could have been cross-examined with a view to showing that his memory was fresher at the time he gave the statement and that he may well have seen Lynne and the appellant leaving the school grounds at around 7:20 p.m.

[467] David Faubert (age eight) and Daryl Wadsworth (age nine) were also part of the group of boys playing baseball at the school grounds on the evening of June 9. Neither testified at trial. They did, however, provide statements to the police.

[468] In a statement dated June 24, Faubert told the police he thought "it would be between 7:15 and 7:30 p.m. when I saw Steve Truscott and Lynne Harper going across the school field towards the County Road."

[469] In his June 24 statement, Wadsworth told the police in some detail about seeing the appellant and Lynne as they were leaving the school grounds. In particular, he remembered "Lynne sitting on the cross bar [of the appellant's bike], at the corner of the County Road and they were headed [north] towards O'Brien's woods." As they passed, "Steve said he was just driving her down to the highway." Wadsworth went on to say that his "team was at bat at the time" and so he "stood up on the road and watched them…" When he last saw them, "they were just approaching the woods and they were both still on the bicycle. They then disappeared over the hill out of sight and I had to go to play ball as it was my turn up to bat... [I]t would [have been] about 7:25 p.m., I think." He also recounted that he and his friends continued to play baseball and that "before we finished playing, Steve came back by himself. This would be about a half an hour after I last saw Lynne and Steve together."

[470] At a hypothetical new trial, the content of these statements could be used to cross-examine Mrs. Nickerson and Warren Hatherall with a view to testing the firmness of the

7:00 to 7:10 p.m. time frame and seeing whether they might not agree that it could have been later that they saw the appellant and Lynne leaving the school grounds, perhaps in the area of 7:20 p.m. or a bit later. At a minimum, such questioning would shed light on their suggestibility quotient. Beyond that, it could result in one or both witnesses actually accepting the later time frame, thereby providing the appellant with original evidence supportive of his position.

[471] At a hypothetical new trial, the statements of Faubert and Wadsworth could be used, at a minimum, to elicit evidence from other witnesses and to provide an evidentiary lead that could yield exculpatory evidence supporting the appellant's position that he left the school grounds later than the time testified to by Mrs. Nickerson. Information found in the statements of Faubert and Wadsworth would provide a counterweight to the evidence of Mrs. Nickerson and Hatherall indicating that the appellant left the school grounds with Lynne between 7:00 and 7:10 p.m. Because the second half of the Crown's Burns–Gellatly cornerstone hinged on the time that Mrs. Nickerson testified she saw the appellant and Lynne leave the school grounds, information that could put their departure some time later is of clear significance.

[472] In sum, there is a considerable body of archival material that could be used at a hypothetical new trial to attempt to delay the appellant's departure time from the school grounds by as many as ten to fifteen minutes, thereby casting doubt on Mrs. Nickerson's 7:00 to 7:10 p.m. estimate, which was the other major premise underlying the Burns−Gellatly cornerstone.

**(b) Impact of the archival material on the Gaudet−George cornerstone**

[473] Turning to the Gaudet-George cornerstone, there is archival material that the appellant at a hypothetical new trial could use to explain why he and Lynne were not seen by Burns, Gaudet, Glover and possibly George. We say "possibly George" because George may well have seen the appellant cross the bridge, as he indicated in his first two statements to the police. We discuss this aspect of George's original statements to police in a separate section of our reasons at paras. 532, 535 and 553-555.

[474] As we have said, Bryan Glover testified at trial that he and Thomas Gillette cycled from the bridge to their homes at the Station to retrieve their fishing rods between 7:00 and 7:10 p.m. on June 9. According to Glover and Gillette, Gillette returned to the river alone, ahead of Glover. Glover testified that he left his home to return to the river between 7:20 and 7:25 p.m. On the cycling reconstruction evidence, he would have arrived back at the bridge between about 7:25 and 7:30 p.m.

[475] However, in his original statement to the police dated June 14, Glover stated that he and Gillette left to go home to retrieve their fishing rods at around "five to seven." He further stated that on the way home, he did not see anyone on the County Road. He said that he changed his clothes and "left again about ten after seven … but when I was going back to the river about ten after seven, at the end of the wood-lot closest to the highway, I saw Arnold George. He was right at the very corner of the woods, on his bike, and just

stopped." He was talking to a girl (Gaudet) who was "in there looking for somebody."[28] Glover said that George was going the same way he was and that George "just stopped a minute." Glover continued to the bridge and just as he was setting his bike at the side of the bridge, George came up and Glover asked him where he was going to go swimming.

[476] Glover's statement is potentially significant. At a hypothetical new trial, the content of the statement could be used to refresh his memory with a view to having him at least acknowledge that it was equally possible that he returned to the bridge at around 7:10, and not at 7:20 or 7:25 p.m. Glover could well accept that his recollection of times was better when he made the statement than when he testified and he might adopt the times set out in his statement. Cross-examining Glover with the assistance of his statement could well lead him to accept that he saw George and Gaudet at around 7:10 p.m. on the tractor trail and that George was at the bridge by 7:15 p.m.

[477] Arnold George's statements to the police could also be used at a hypothetical new trial to challenge the Crown's theory of when he was on the County Road. At trial, George testified that he saw Gaudet on the tractor trail at about 7:20 p.m. He then cycled north to the bridge. This trip would have taken him a minute or so according to the cycling reconstruction evidence (see Appendix 4). A police officer's notes of a conversation with George on June 11 say nothing about when he was on the County Road. In another officer's notes of a conversation on June 12, George indicated that he

[28] Although Glover stated that Gaudet was "in about forty yards" (presumably down the tractor trail) when he saw her and George talking to each other, neither George nor Gaudet agreed with that. According to them, Gaudet was almost at the County Road when she and George met and chatted briefly.

was at the swimming hole under the bridge at "about 7:00 p.m." In his formal statement provided on June 15, George said he rode his bike north from the school at "about 7:00 p.m." In this statement, he went on to say that as he rode north, he saw Gaudet on the tractor trail, "about 20 feet away from the fence, … walking towards me." In this statement, George said he chatted briefly with Gaudet and, as they were talking, Glover rode by on his bicycle headed north. George then went on to the bridge.

[478] At a hypothetical new trial, the latter two statements could be put to George with a view to establishing that he was on the County Road near the tractor trail talking to Gaudet at a time closer to 7:10 than 7:20 or 7:25 p.m. Likewise, the suggestion could be put to George that he arrived at the bridge shortly before 7:15 p.m., rather than some time after 7:20 p.m. as indicated by his trial testimony.

[479] The relatively small differences between the times as testified to by George at trial and those which may be implied from the content of his statements are important for two reasons. First, if the appellant and Lynne did not come onto the County Road until after 7:20 p.m., as the appellant claimed and Gellatly confirmed, this timing would explain why George did not see them at around 7:10 p.m. It would also explain why Burns, who did see George, did not see the appellant and Lynne, because by 7:20 p.m. or shortly thereafter, he would have been south of the road that leads from the school grounds to the County Road.

[480] Second, because the evidence of Burns and Glover puts Gaudet and George together on the County Road, George's original statements also help account for Gaudet's movements and explain why she did not see the appellant at around 7:10 to 7:15 p.m. Quite simply, the appellant would not have been on the County Road, let alone at the bridge, in that time frame. Likewise, if Gaudet returned from Mr. Lawson's barn to the road after 7:25 p.m., as Mr. Lawson reported, and went back to the bush for a short period of time before returning to his barn at 7:45 or 7:55 p.m., the appellant in that time frame would have passed the bridge, dropped Lynne off at Highway 8 and returned to the bridge. This would explain why Gaudet did not see him.

[481] That leads directly to a statement Mr. Lawson gave to the police on June 25. At trial, Mr. Lawson testified that on the evening of June 9, Gaudet came to his barn looking for the appellant at about 7:10 or 7:15 p.m. According to Mr. Lawson, she left at 7:25 p.m. "to go back to the bush." As the appellant points out, defence counsel, Mr. Donnelly, may have taken the words "back to the bush" to mean the direction in which Gaudet intended to go.

[482] However, in a statement to the police dated June 25, Mr. Lawson described his initial meeting with Gaudet as follows:

> Prior to leaving *she said she had been down at the bush looking for Steve and went down towards the bush again to look for him.* [Emphasis added.]

In the same statement, Mr. Lawson confirmed that Gaudet returned to his barn twenty minutes or half an hour later (*i.e.*, 7:45 to 7:55 p.m.) and that she told him she "still hadn't found Steve."

[483] This statement is important for two reasons. First, at a hypothetical new trial, the appellant could use the information found in this statement to clarify that Mr. Lawson's testimony meant that at 7:25 p.m., Gaudet had already been to the bush and was now about to return for a second time. Second, the defence could use the information in this statement to cross-examine Gaudet with a view to showing that she was not telling the truth when she testified that she was only at Lawson's Bush one time that evening and, more generally, that she was not being candid in her testimony about her whereabouts. The appellant could urge the jury to proceed with great caution before acting on Gaudet's evidence to convict him.

**(c) Impact of the archival material on the Teunis Vandendool cornerstone**

[484] At trial, Teunis Vandendool testified that he left home between 7:05 and 7:10 p.m. to go swimming and that he reached the corner of the County Road and Highway 8 between 7:15 and 7:20 p.m., went down a path to the river and swam for ten or fifteen minutes. He said that he began his return trip home between 7:30 and 7:35 p.m. At no time did he see a boy or girl on a bicycle, nor did he see any people at the intersection on either the trip to or from the river.

[485] In a statement provided to the police on July 6, Vandendool said that he left his home to go swimming at 7:00 p.m., five or ten minutes earlier than the times he gave at trial. Accordingly, at a hypothetical new trial, Vandendool could be cross-examined with a view to showing that he was out on his timing by up to ten minutes and that he may well have left the bridge to return home between 7:20 and 7:25 p.m., *i.e.*, before the appellant and Lynne would have reached the bridge, assuming they left the school grounds shortly after 7:20 p.m.

[486] Standing alone, this discrepancy would likely be considered insignificant. But the Vandendool cornerstone itself was shaky and much less compelling than the other two cornerstones. Crown counsel made this acknowledgement in his closing address to the jury and the trial judge affirmed this view in his charge. Hence, the little bit of leverage that might be gained from Vandendool's statement could be used to cast further doubt on what was already a "weak link" in the Crown's County Road chain.

**(iv) A credible alternative to the Crown's County Road theory**

[487] In the immediately preceding section, we demonstrated how the archival material produced by the appellant could be used at a hypothetical new trial to attempt to weaken the three cornerstones of the Crown's County Road theory. We approached the archival material by considering its impact on the Crown theory because at a hypothetical new trial, the Crown of course bears the burden of proof. The appellant is not obliged to prove to any degree what happened on the County Road, only that the Crown's version is insufficiently reliable to be accepted by a jury.

[488] Counsel for the appellant also contend, however, that the archival material paints a picture that is consistent with the defence County Road theory. That theory is essentially the exculpatory version of the appellant's movements that he gave to the police in the days following Lynne's disappearance and after the discovery of her body.

[489] On the appellant's version, he and Lynne left the school grounds sometime shortly after 7:20 p.m.[29] They rode past Gellatly at about 7:25 p.m., as testified to by Gellatly. They proceeded north on the County Road on the appellant's bike. They crossed the bridge just before 7:30 p.m. and reached Highway 8 just after 7:30 p.m. Lynne got off the bike and the appellant returned on his bike to the bridge. He remained there for several minutes and then rode back to the school.

[490] According to the appellant's version, he did not see Burns, Gaudet or George on the County Road as he and Lynne made their way north. He did see George in the river as he crossed the bridge with Lynne. On the appellant's version, Vandendool was not in the vicinity when he and Lynne rode north of the bridge to Highway 8.

[491] The archival material supports several aspects of the appellant's narrative of the County Road evidence. Before demonstrating how it does so, we stress that the archival

[29] We acknowledge that this timing is somewhat inconsistent with the appellant's sworn testimony before the Supreme Court of Canada in which he stated that he and Lynne left the school grounds "one minute either way of 7:30 p.m." On this Reference, counsel for the appellant contend that the time of departure from the school grounds was around 7:30 p.m. We prefer the earlier time of shortly after 7:20 p.m. because it is largely consistent with the appellant's various statements that he gave to the police during their investigation when his memory would have been fresher than some seven years later at the first Reference. In addition, the earlier time is more consistent with the archival statements of Mrs. Nickerson, Stuart Westie, David Faubert and Daryl Wadsworth as well as with the trial testimony and archival statements of Richard Gellatly.

material does not prove the correctness of the defence narrative. Nor does it need to in order to support the appellant's claim that he would be acquitted at a new trial. The weakening of the Crown's County Road theory and the reinforcing of the appellant's County Road narrative are two sides of the same coin. The value to the defence at a hypothetical new trial comes from the sum of the two.

[492] We also stress that in considering the impact of the archival material on the defence County Road theory, we do not attribute to that material more accuracy or reliability than it can reasonably bear. As with parts of the archival material that challenge the Crown's theory, parts of the material that support the defence position contain inconsistencies and uncertainties that can probably never be resolved.

[493] Some of the inconsistencies and uncertainties revolve around the timing of the relevant events. To try to minimize those uncertainties, we address the defence theory of the County Road and the effect of the archival material by having regard to the times recorded in the walking and cycling reconstructions performed by Burns and Desjardine for the police (see Appendices 3 and 4). We also use, as markers, times given by various witnesses who checked their watches or clocks and whose times according to the Crown in these proceedings, "were therefore inherently more reliable than the evidence of those witnesses without an ability to fix their time estimates." The pertinent ones are as follows:

- 6:50 p.m. – 7:10 p.m.[30] – Sgt. McCafferty checked his watch to provide the time to Mrs. Geiger and Philip Burns

- 7:25 p.m. – Mr. Lawson checked his watch to tell Gaudet the time as she left his barn to go look for the appellant at the tractor trail

- 7:32 p.m. – Michael Burns looked at the clock as his brother Philip arrived home

[494] Bearing those times in mind, we now highlight the available findings of fact that are consistent with the defence narrative of the County Road evidence and that fit with the totality of the evidence, including the archival material. In Appendix 5, we also offer a more detailed account of a theory of the County Road evidence that is consistent with the appellant's contention that he dropped Lynne off at the highway.

[495] We already reviewed the material that supports the inference that Burns left the area of the bridge some time before Gellatly. The evidence also supports a finding that Burns started his trip south from the river at about 7:00 p.m. This time is consistent with the time that Sgt. McCafferty gave after checking his watch. It also largely conforms to the times given in the walking reconstruction evidence led by the Crown and the time that Michael Burns gave for when Philip arrived home.

[496] Based on the approximate time it would take Burns to walk from the bridge to the point where the County Road meets the school grounds, Burns would have passed the

[30] Sgt. McCafferty testified that Mrs. Geiger asked him the time and he remembered saying that it was "either ten to seven or ten after seven."

school on his way home before 7:20 p.m. This is consistent with the evidence that neither the appellant nor Burns saw one another on the road.

[497] The evidence indicating that Burns left the bridge at about 7:00 p.m. supports two other facets of the defence County Road theory. Burns met Gaudet about 100 feet north of the south end of Lawson's Bush. Having regard to the approximate amount of time it would take Burns to walk from the bridge to that part of the County Road, he would have run into Gaudet at about 7:10 p.m. If she were looking for the appellant along the County Road at around 7:10 p.m., she would not find him on the defence theory because he had not yet left the school grounds.

[498] Similarly, if Burns left the bridge at about 7:00 p.m., he would have encountered Arnold George biking north towards the bridge at about 7:12 p.m., just south of Lawson's Bush. It would have taken George only a couple of minutes to bike from there to the bridge. This would place George on the bridge and in the river by 7:15 p.m., approximately five minutes before the appellant and Lynne started north on the County Road. This is consistent with the appellant's claim that he did not see George on the road but did see him in the river.

[499] The times provided by Glover in his statement also explain why, on the appellant's version of events, George did not see the appellant and Lynne north of Lawson's Bush as he cycled towards the river. According to that statement, Glover saw George and Gaudet at the tractor trail at about 7:10 p.m. and George arrived at the bridge about one minute

after Glover's arrival there, *i.e.*, before 7:15 p.m. (According to the cycling reconstruction performed by Paul Desjardine on June 20 under the direction of Corporal Sayeau, it would have taken the boys one minute and thirty seconds to cycle from the tractor trail to the bridge: see Appendix 4.) The appellant and Lynne had not yet left the school grounds at that time.

[500] The defence theory of the County Road evidence also finds support in the archival material pertaining to Gaudet's movements. The witness statements of Glover and George lend credence to the view that it was about 7:10 p.m. when Gaudet encountered Burns and George at or near the tractor trail. If she was looking for the appellant then, she would not have found him there because, on the defence theory, he was still at the school grounds.

[501] Gaudet testified at trial that after George passed her on his way towards the river, she also travelled to the bridge looking for the appellant. She did not see him there. She said she stayed for five or ten minutes and then returned to Lawson's barn. If Gaudet in fact went to the bridge (only George testified to having seen her there), it is unlikely that she would have stayed there for up to ten minutes after realizing right away that the appellant was not there. It is more consistent with the evidence and the archival material that she left the bridge on her bike at around 7:15 p.m. to go to Lawson's barn, because Mr. Lawson's testimony and his archival statements suggest that she came to his barn, stayed a few minutes and then left at 7:25 p.m.

[502] The information found in Mr. Lawson's archival statement of June 25 indicating that before Gaudet went to his barn she had already been to the bush supports a finding that, contrary to Gaudet's trial testimony, she first went north along the County Road to Lawson's Bush and then on to the river before she went to Lawson's barn in search of the appellant. This version of events fits more comfortably with Gaudet's trial testimony that the appellant had told her to keep their proposed meeting at Lawson's Bush quiet because Mr. Lawson did not like children on his property.

[503] The information in Mr. Lawson's archival statement that Gaudet left his barn at 7:25 p.m. to return to the bush is also consistent with the defence position that Gaudet travelled from the bridge south on the County Road and past the school on her way to Lawson's barn just before the appellant and Lynne moved onto the County Road shortly after 7:20 p.m. In addition, this departure time from the barn supports the contention that Gaudet went north on the road to the tractor trail for a second time just after 7:25 p.m., a few minutes behind the appellant and Lynne.[31] The timing, while it suggests two near misses by Gaudet and the appellant (one as she went south and he went north; the other as both went north), is not an unreasonable assessment of the evidence. Part of it, at least, is grounded in Mr. Lawson's recollection of the time Gaudet left his barn, one of the more reliable pieces of the "timing" evidence.

[31] If she did walk the length of the tractor trail (300 feet), as she claimed in her trial testimony, she likely did so on this second occasion.

[504] No one will ever know exactly who was where at each precise moment along the County Road between 7 and 8 p.m. on June 9, 1959. We are satisfied having regard to the material placed before us, that it is unlikely that a jury would be convinced of the Crown's version of the County Road evidence. The totality of the record suggests significant flaws in each factual cornerstone of that theory. While we do not go so far as to say that any jury would reasonably be convinced of the truth of the appellant's theory of the County Road evidence, we do say that the archival material adds significant force to that theory. The defence theory fits comfortably with the totality of the material as we now have it. It is reasonably arguable that the defence theory is at least as tenable as, if not more tenable than, the Crown's theory of the County Road evidence.

**THE THIRD PILLAR OF THE CROWN'S CASE: THE APPELLANT'S POST-OFFENCE CONDUCT**

[505] The Crown urged the jury to conclude that the appellant's conduct in the days immediately following Lynne's disappearance was indicative of his guilt. There were three main components to this pillar of the Crown's case. First, the Crown led evidence that the appellant asked his friend, Arnold George, to lie to the police in support of his exculpatory statements that he gave to the police shortly after Lynne went missing. Second, the Crown led evidence that was said to demonstrate that the appellant fabricated the story about standing on the bridge and looking back to see Lynne getting picked up at the highway by a vehicle. Finally, the Crown led evidence of a series of statements that the appellant allegedly made to George and other friends. The Crown submitted that

these statements constituted admissions by the appellant that he was in Lawson's Bush on Tuesday evening, either alone or with Lynne.

[506] The first component of this pillar of the Crown's case – the request that George lie to the police – relied entirely on George's testimony. No one else gave any evidence capable of supporting this part of his testimony. The second component of this pillar of the Crown's case – the allegation that the appellant fabricated his story that he saw Lynne get into a car while standing on the bridge – depended on photographic evidence as well as evidence of certain visibility tests conducted by the police. The Crown contended that this evidence proved that the appellant could not possibly have seen what he said he saw while on the bridge. The third component of the Crown's post-offence conduct pillar – the appellant's post-disappearance conversations with friends – rested primarily on the evidence of George, and to a lesser extent, on evidence from other children who were involved in the conversations.

[507] Since George's evidence is so central to two of the three components of this pillar of the Crown's case, we first address his evidence and the archival material relating to it. After considering George's trial evidence and the impact of certain material discovered in the archives, we next examine the visibility evidence, both as led in the previous proceedings and as it now stands. Last, we briefly refer to the statements the appellant made to George and to other children in the days immediately following Lynne's disappearance.

**1. Arnold George's Evidence**

[508] In the previous section, we discussed the importance to the Crown's County Road theory of George's trial testimony. In the course of referring to the archival material relevant to the County Road evidence, we referred to certain statements that George apparently made to the police. We set out how these statements could assist the appellant in challenging the Crown's County Road theory and in advancing his own theory at a hypothetical new trial.

[509] George's trial testimony was not only important to the Crown's County Road theory. The Crown also relied on his testimony to establish that the appellant lied to the police when he told them that he had seen Arnold George in the river as he crossed the bridge with Lynne and that he asked George to lie to the police and confirm that he had seen the appellant. This evidence, if accepted by the jury, constituted powerful evidence of the appellant's guilty mind. The Crown further relied on George's testimony as evidence of an admission by the appellant that he had been with Lynne at or near Lawson's Bush on Tuesday evening.

[510] The defence challenged George's credibility at trial. Counsel brought out inconsistencies and frailties in his evidence. Mr. Martin reiterated many of these points on the first Reference. The appellant in his testimony at the first Reference denied that he had asked George to lie for him and further denied that he had told George that he and Lynne were at or near Lawson's Bush looking for a cow. The majority of the court did not believe him.

[511] The new material before this court includes three statements found in the archives which George made to the police in the days following Lynne's disappearance and after the discovery of her body. For reasons detailed below, we are satisfied that these statements could have the following impact at a hypothetical new trial:

- a jury might well reject George's evidence that the appellant asked him to lie to the police;
- a jury might well reject George's evidence that the appellant admitted being with Lynne at or near Lawson's Bush on the evening of June 9;
- the evidence of the defence witnesses, Gordon Logan and Doug Oates, could be bolstered by information found in these statements, while the Crown's claim that the appellant fabricated a story of taking Lynne to the highway could be undermined.

[512] We now provide a summary of the aspects of George's trial testimony that were not discussed in the previous section on the County Road pillar of the Crown's case.

**(i) George's trial testimony**

[513] George testified that after dinner on June 9, he went to the appellant's home looking for him. The appellant was not home. George searched for him on his bike in the area of the P.M.Q. After leaving the P.M.Q., he rode down to the river looking for the appellant. As he headed north, he saw Philip Burns walking south on the County Road at a point south of Lawson's Bush.

[514] George continued northward on the County Road. He saw Jocelyne Gaudet standing on the tractor trail. She walked towards him and they spoke briefly. George asked her if she had seen the appellant. George believed that he met Gaudet at about 7:20 p.m.

[515] After speaking briefly with Gaudet, George rode north to the bridge. He left his bike on the bridge and went down to the river for a swim. While on his way down, he saw Gaudet standing on the bridge. She asked him if he had seen the appellant. He had not. George testified that he stayed at the river until 8:30 p.m. when he went back up to the road and biked south towards the school on his way home.

[516] George testified that although he was looking for the appellant on the County Road and while he was at the river, he did not see him or Lynne at any time before he left the river and headed for home at about 8:30 p.m. This evidence contradicted the evidence led at trial through the Crown's witness, Constable Hobbs, that the appellant had told the officer that on his way down, he waved to George who was swimming in the river.

[517] George further testified that on his way home from the river, he went around the school before going home. From there, he went to the appellant's house, arriving at about 8:45 p.m. George saw the appellant and asked him where he had been. The appellant replied, "Down at the river." George told the appellant that he had heard that he had given Lynne Harper a ride down to the river. The appellant responded, "Yes, she

wanted a lift down to Number Eight Highway." George then said, "I heard you were in the bush with her." The appellant replied, "No, we were on the side of the bush looking for a cow and calf." According to George, the appellant asked him, "Why do you want to know for?" George testified that he then changed the topic.

[518] George testified that by Wednesday morning, everyone at school was talking about Lynne's disappearance. The appellant mentioned that he had given her a ride to the highway and saw her getting a ride with a grey Chevrolet with yellow licence plates.

[519] George then testified to a conversation that he had with the appellant on Wednesday evening, June 10. The appellant told George that the police had questioned him and that he had told them that he had seen George down at the river when in fact the person he saw was Gordon Logan. The appellant indicated he had confused Logan and George. George testified that the appellant told him that the police would be coming to see George to "check-up" on his story. George testified that he agreed that he would tell the police he had seen the appellant at the river even though he had not.[32]

[520] George also testified about a conversation at the bridge involving himself, the appellant and several other boys, which took place on either Wednesday, June 10 or Thursday, June 11. At trial, he could not recall on which night the conversation took

[32] Part of George's testimony regarding this conversation is arguably inconsistent with the police evidence. According to the officers who questioned the appellant, he did not mention seeing George until Thursday, June 11. Mr. Donnelly made this point in his closing argument, reminding the jury that the appellant did not tell the police he had waved at Arnold George on Wednesday, but rather that he did so on Thursday. We note the possibility that the appellant was lining up support for his story in anticipation of telling the police that he saw George.

place, although at the preliminary inquiry some two months earlier, he testified that it occurred on Wednesday.

[521] According to George, one of the boys who participated in the conversation, Paul Desjardine, said to the appellant, "I heard you had Lynne up in the bush with you." George testified that the appellant replied, "No, I didn't, did I, Butch?"[33] George responded, "You had her at the side of the bush looking for the cow and the calf." According to George, the appellant did not respond to this comment.

[522] In cross-examination, George confirmed that he did not see the appellant's distinctive green bicycle anywhere on the side of the road near Lawson's Bush or along the tractor trail when he was looking for the appellant. George also confirmed that there were several other boys down at the river, including Gordon Logan.

[523] George also agreed in cross-examination that he had not seen the appellant with Lynne Harper at the side of Lawson's Bush. George was not asked for and did not offer any explanation for why he suggested to the appellant on the night Lynne disappeared, and before anyone knew she was missing, that he had heard from an unidentified source that the appellant and Lynne had been in the bush together. As we understand the appellant's position, if George in fact said this to the appellant, he simply made up the suggestion that the appellant was in Lawson's Bush with Lynne.

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[33] Arnold George went by the nickname "Butch".

[524] George was cross-examined about the statement that the appellant allegedly made to him on Tuesday evening. He agreed that the appellant had told him in that conversation that Lynne had been picked up by a 1959 Chevrolet at Highway 8 that was headed towards Seaforth. He also acknowledged that at the preliminary inquiry, he did not refer to the appellant saying anything about being near the bush with Lynne looking for a cow and calf. He said that he had forgotten about this part of the conversation when he testified at the preliminary. Defence counsel also brought out certain inconsistencies between George's preliminary inquiry testimony concerning the conversation at the bridge among the group of boys on Wednesday evening and George's trial testimony concerning that conversation.

[525] Also in cross-examination, George acknowledged that he had made three statements to the police. He agreed that the first two statements were different from the third. George testified that he had been given a copy of his third statement prior to testifying and that he had read it over about ten times to be sure of what he was going to say in court.

[526] At the preliminary inquiry, George admitted that he had lied to the police. However, it was not until re-examination at trial by the Crown that he was asked to explain why he lied to the police on two occasions before telling them the truth in his third statement. In responding to these questions by the Crown, George indicated that in the first two statements to police, he had told them that he had seen the appellant while he

was at the river, but when Lynne Harper's body was found, he changed his story in what was his third statement:

> Q. I had asked you, Arnold, why you gave two false statements to the police? Why did you do it?
>
> A. Well, like Steve said he had seen me down at the river and he thought well, he said he had seen me down at the river and he told the Police that, and then he told me that he had told the Police that.
>
> …
>
> A. *He [Steven] told the Police that I had seen him down at the river and I didn't think there would be any harm then, so I just told them I had seen Steve at the river, and when the body was found, I changed my story.* [Emphasis added.]

[527] In his closing argument, Crown counsel encouraged the jury to find that the appellant's request of George to lie to the police for him provided evidence of the appellant's guilty mind:

> Now, according to Arnold George, he agreed with Steven that he would lie to the Police. And the proof of that is brought out in the fact that he did lie to them on that. He gave them two stories that he told us were false, to help his friend. *Now, doesn't that indicate a pretty guilty frame of mind of Steven Truscott, when he would resort to getting his friend to lie to the Police about being seen? Doesn't it shake any theory that may be advanced to you that he took this girl to the highway? Is that the action of an innocent man, to take part in the fabricating of evidence?* [Emphasis added.]

[528] Crown counsel further urged the jury to believe George's evidence despite his admitted lies to the police. In making this submission, the Crown relied heavily on the

friendship between the boys to explain George's initial lies. He also relied on George's explanation in re-examination for finally telling the police the truth:

> Steven and Arnold George were close friends. *They were close, that in order to protect Steven, by an agreement Arnold George did tell the Police that he had seen Steven and Lynne go to the highway.* I think there were two statements. *But when Lynne's body was found, the boy came to a realization that to protect a friend can go just so far, and then he gave a right statement.*
>
> Now, it may be thought to be damaging, his admission that he told a falsehood at any stage and that isn't too reliable, but you have got to put it in its relationship, whether he was likely to say anything to hurt Steven later. *Why did he falsify things? It was to help Steven. They were pals.* And I suggest, Gentlemen, when the boy comes into Court here and pledges his oath, as he did, that it is nothing but the truth that he gives now. [Emphasis added.]

**(ii) The archival material relating to George's evidence**

**(a) George's three statements**

[529] As discussed above, George testified in cross-examination that he made three statements to the police. In his testimony, he said the first two statements were false but the last statement was true. Material found in the archives provides evidence of the following statements made by George:

- Constable Hobbs' notation summarizing an interview with George on June 11 before Lynne Harper's body was found (referred to as the first statement);

- notes found in a three-ringed binder belonging to Inspector Harold Graham, the lead O.P.P. investigator, summarizing an interview with George (referred to as the second statement); and

- a formal statement dated June 15, 1959 and signed by George (referred to as the third statement).

[530] The appellant argues that the statements could be admitted for their truth under the principled exception to the rule against hearsay. The appellant also argues that the contents of these statements and the circumstances surrounding the timing of the second statement could significantly damage George's credibility and thereby weaken the Crown's case at a hypothetical new trial. We are not satisfied that the appellant has made out an arguable case for admitting the contents of George's statements for their truth. A meaningful assessment of the reliability of the statements is not possible at this time. We do not regard George's 2002 testimony before Mr. Kaufman as providing any assistance in determining the reliability of his 1959 statements.[34]

[531] We do, however, accept the appellant's submission that the contents of the statements and especially the evidence concerning the timing of the second statement could be very valuable to the defence in challenging George's credibility at a hypothetical new trial. For reasons we explain, this material could lead a jury to reject, or

[34] George's evidence before Mr. Kaufman differs in significant ways from his trial evidence. As in the case of Gaudet, the content and tone of his evidence during questioning strongly indicate that whatever may be said about the reliability of his evidence in 1959, he is now thoroughly unreliable. We place no weight on his recent testimony and do not regard it as assisting us in assessing his reliability in 1959.

at least seriously doubt, all of his trial testimony, especially those parts of his testimony that are not supported by any other evidence.

[532] The first statement of Arnold George is contained in Constable Hobbs' police notes, which were discovered in the archives. These notes contain what appears to be a summary of a conversation that Constable Hobbs had with George on Thursday, June 11 at the school before Lynne Harper's body was found. The Crown accepts that Constable Hobbs spoke with George on June 11 and that the note in question reflects at least part of that conversation. The note reads in its entirety:

> Arnold George saw Truscott & Harper on a cycle go toward #8 Hwy.

[533] With one exception that we will refer to below (see para. 556), this first statement would not be particularly helpful at a hypothetical new trial. George had acknowledged in his trial testimony that when he first spoke to the police, he falsely told them he had seen the appellant while he was at the river on the evening of June 9.

[534] Also of more limited significance to George's credibility and the reliability of his evidence is his third statement. Found in the archives, it is a formal witness statement signed by George and dated June 15. This three and a half page, single-spaced document is consistent in most respects with George's trial testimony. This is not surprising because this is the statement that George said he read repeatedly to refresh his memory before testifying. Again, with one exception to which we will refer below (see paras.

557-561), had this statement been available at trial, it would not have significantly assisted the defence.

[535] The controversy between the parties about the three statements of Arnold George arises primarily out of what is referred to as the second statement. This is the statement summarized in the notes found in Inspector Graham's binder. The binder, labelled "H. H. Graham", was found in the Archives of Ontario by counsel for the appellant. It contains several unnumbered and undated pages, many of which relate to the Harper homicide. The pages are not in chronological order in the binder. Summaries of what appear to be interviews with various witnesses are found on several pages. One summary reads:

> Arnold George 13.
>
> Tues – had supper, cut lawn. Went to swimming hole about 7 p.m. – Was there about 15 minutes when Steve & Lynne biked north. Went for swim on east side of bridge – I came home just before dusk – about 8:30 p.m. Before that, I went to Steve's house & chatted. He was babysitting. Didn't talk to him about Lynne.

[536] The appellant submits that this notation is Inspector Graham's summary of his interview of Arnold George on the afternoon of June 12, the day after Lynne Harper's body was found. If this submission about the timing of the second statement is correct, then this note indicates that George told the police a day after the discovery of the body that he saw the appellant and Lynne bike north. Thus, his testimony at trial that he stopped lying to the police when the body was found would have been open to serious challenge.

[537] The Crown accepts that the note appears to be a summary of a conversation that a police officer had with George in the course of the investigation into Lynne Harper's disappearance and homicide. The Crown submits, however, that the material relied on by the appellant does not necessarily support the inference that the conversation was with Inspector Graham, or more importantly, that it took place on June 12. It is the Crown's position that the notes found in the binder could be Inspector Graham's summary of information provided to him by other police officers who had questioned George on June 10 or 11, at some time before Inspector Graham took charge of the investigation.

**(b) To whom and when did George give his second statement?**

[538] There is no longer any direct evidence either as to who conducted the interview reflected in the note in Inspector Graham's binder or when the interview occurred. There is, however, a formidable body of circumstantial evidence that has been produced by the appellant supporting his claim that Inspector Graham spoke to George on June 12 and recorded a summary of that interview in his binder.

[539] We agree with the appellant that the notation is in Inspector Graham's handwriting. The language in the notation suggests it is a record of a conversation between the writer of the note, Inspector Graham, and the witness, George. Phrases like, "I came home just before dusk", and, "I went to Steve's house", appear in the notation. This phraseology is inconsistent with the Crown's suggestion that Inspector Graham was recording something told to him by another police officer about what George had said a day or two earlier.

[540] Counsel for the appellant have also produced from the archives a copy of Inspector Graham's handwritten, work-related diary from 1959, an undated witness statement that Inspector Graham appears to have provided, as well as memoranda that he prepared in 1966 prior to the first Reference. These documents detail the various steps Inspector Graham took during the murder investigation. They make it clear that he was not involved in the investigation until the evening of June 11, after Lynne Harper's body was found. They also make it clear that he did not interview any child witnesses until June 12. Thus, if the notation in the binder reflects a conversation that involved Inspector Graham, it could not have taken place before June 12.

[541] Inspector Graham is deceased and obviously unavailable to testify. We are satisfied that the diary entry, the statement and the memoranda are sufficiently reliable to render them admissible for their truth insofar as they describe Inspector Graham's activities in the course of his investigation. None of these documents refer specifically to an interview with Arnold George. However, they do indicate that Inspector Graham interviewed several children on the afternoon of June 12 and that George was very likely one of the children interviewed.

[542] Inspector Graham's diary entry for Friday, June 12 reads: "Interviewed Steven Truscott … Interviewed boys all day." Inspector Graham's undated witness statement indicates that he interviewed the appellant on the morning of Friday, June 12. It further states that in the afternoon, "other children were questioned in the Guard House and notes were made." A typewritten version of the appellant's interview with Inspector Graham

on the morning of June 12 reveals that the appellant had provided the names of children whom he claimed to have seen on Tuesday evening, including Arnold George. It is reasonable to infer that on the afternoon of June 12, Inspector Graham and other officers interviewed the children whom the appellant had identified in his interview with Inspector Graham that morning, including Arnold George.

**(c) Impact of the second statement at a hypothetical new trial**

[543] The archival material leads us to conclude that at a hypothetical new trial, the defence could use the information found in this material to challenge George on his claim that he told the truth to the police after Lynne Harper's body was found. The defence could suggest to George that he was interviewed by Inspector Graham on June 12, a day after the body was found and when George was fully aware that the body had been found. The defence could further suggest to George that, even then, George continued to tell the police that he had seen the appellant and Lynne cycling north on the County Road. If George denied this suggestion, the material summarized above could be used to satisfy the jury that Graham had indeed interviewed George on June 12 and that he had lied in claiming that the interview took place before the body was found. If George accepted the defence suggestion, this would be tantamount to a concession by George that he had lied under oath at trial when he gave his explanation for why he had changed his story.

[544] Thus, at a hypothetical new trial, the defence could have either an admission by George that, contrary to his earlier testimony, he continued to support the appellant's story even after the body was found, or the defence could have evidence from which the

jury could infer that George was standing by a lie that he had told at the first trial when he testified that he changed his story after the body was discovered. Either possibility would have powerful potential impeachment value for the defence.

[545] In its closing, the Crown painted George in a very sympathetic light and presented a plausible and almost laudable explanation for George's initial lies to the police. George was depicted as a very loyal friend who had at first lied to help the appellant, but who appreciated that after Lynne's body was found, he had to tell the police the truth, even if the truth hurt his good friend.

[546] If a jury were to hear evidence from which it could find that George lied about telling the truth once Lynne's body was found, a jury might well see George not as a loyal friend who ultimately saw his civic duty, but as someone who had admittedly lied to the police and who lied to the original jury with respect to his explanation for changing his story to the police. A jury would be left to wonder what really had caused George to so drastically change his story between June 12, when he told the police that he saw the appellant and Lynne headed north while he was at the river, and June 15, when he claimed that he had been looking for the appellant on the County Road and had not seen him until he went to the appellant's house at about 8:45 p.m.

[547] If, based on the archival material, a jury at a hypothetical new trial were to conclude that George's credibility was suspect, those parts of his testimony that were unsupported by any other evidence would be particularly vulnerable to being rejected by

the jury. George's evidence that the appellant asked him to lie to the police for him was unsupported by any other evidence. Similarly, George's evidence that the appellant said that he and Lynne were near the bush looking for a cow and a calf on Tuesday evening was unsupported by any other evidence. The jury's rejection of these parts of George's evidence would put a large hole in the Crown's post-offence conduct evidence.

[548] While the archival material concerning the timing of George's second statement offers the most significant basis for challenging George's credibility, the content of the second statement provides a further ground upon which his credibility could be effectively impeached. According to the notation in Inspector Graham's notebook, George said:

> Didn't talk to him [Steven] about Lynne.

[549] This notation indicates that George was specifically asked on June 12 whether he had any conversation with the appellant about Lynne on Tuesday evening, June 9 and that he denied that any such conversation had occurred. However, a few months later at trial, George told a very different story. As we have described, he related a conversation on the Tuesday evening in which the appellant indicated that he and Lynne had been near Lawson's Bush looking for a cow and calf. At trial, when defence counsel confronted George with his failure to mention this part of the conversation at the preliminary inquiry, George responded that he had forgotten about it when he testified at the preliminary.

[550] A jury could well accept that a thirteen-year-old boy testifying in the somewhat intimidating atmosphere of a courtroom could forget part of a conversation. However, George's suggestion that he had done so would be much harder for the jury to accept if the defence could ask George about his second statement in which he expressly denied any discussion about Lynne on the evening of June 9. It is certainly reasonably possible that George's explanation that he forgot about the conversation when he testified at the preliminary inquiry would ring hollow in the face of evidence that some three days after the conversation allegedly occurred, George specifically told police that there was no conversation about Lynne.

[551] It is difficult to imagine what George might have said to help his credibility when confronted with the assertion in his second statement that he did not speak to the appellant about Lynne on the evening of June 9. George could not attribute this part of his statement to a request by the appellant that he lie to the police. Nor could George suggest that he was trying to help his friend by denying that there was any conversation about Lynne on June 9. It was an important part of the defence position that the appellant told George that he had taken Lynne to the highway and that he saw her get picked up in an automobile. If George were going to lie to help his friend, presumably he would have supported this story, not denied that there was any conversation about Lynne.

[552] We are satisfied that if a jury at a hypothetical new trial were informed of the content of George's second statement, as well as his preliminary inquiry and trial testimony on the point, the jury could well conclude that George for some reason felt

compelled to embellish his evidence at trial in ways that damaged the appellant. If the jury looked at George's evidence in this way, they could reject his evidence that the appellant had asked him to lie to the police or that the appellant had admitted being near Lawson's Bush with Lynne looking for a cow and calf.

[553] There is yet another inconsistency between the statement given by George on June 12 and his trial testimony. At trial, George explained that he had lied to help his friend after the appellant said to him that he told the police that he saw George at the river when in fact the person he saw was Gordon Logan. According to George, he lied to the police to support what his friend said he had told the police.

[554] However, according to his second statement, George did not simply tell the police that he had seen the appellant at the river. Instead, George told the police that he had seen the appellant and Lynne Harper cycling north towards the highway. The actual content of George's second statement to the police was inconsistent with his trial statement about the lie the appellant asked him to tell the police.

[555] At a new trial, George could be challenged as to why he told a different story to the police than the one he claimed the appellant had asked him to tell. Presumably, George would be forced to modify his evidence as to what the appellant had asked him to say to the police to make it consistent with what he in fact told the police. This could only diminish George's credibility.

**(d) Impact of the first statement at a hypothetical new trial**

[556] As we have said, George's first statement to the police on June 11 would not be very helpful to the appellant at a hypothetical new trial. However, the first statement contains the same inconsistency as was just described in paras. 553-554 in relation to the second statement. In both the first and second statements, George told the police that he saw the appellant and Lynne Harper cycling towards the highway. Accordingly, the information found in the first statement could also be used to attempt to impeach George's credibility in the manner discussed in para. 555.

**(e) Impact of the third statement at a hypothetical new trial**

[557] Counsel for the appellant contend that George's third statement, dated June 15, could also have been used to effectively cross-examine him, as well as to elicit exculpatory evidence and to point the defence towards potentially helpful evidence. We conclude that information in the third statement could be used by the defence at a hypothetical new trial to attempt to elicit evidence to rebut the Crown's allegation that the appellant fabricated a story about taking Lynne to the highway only some time after the police began investigating her disappearance.

[558] In the third statement, George described looking for the appellant on the County Road and going for a swim in the river. He went on to say:

> I went swimming after that. I asked the guys, Gordie Logan, Richard Gellatly, Ken Geiger, Gary Geiger, Robb Harrington, Hessy Daum, Darrell Gilks if they had seen Steve. *Some of them said they had seen him. Logan or Gellatly and Ken*

> *Geiger, I think, said they had seen Steve with Lynne going down towards No. 8 Highway.* [Emphasis added.]

[559] The appellant argues that this part of George's statement is admissible to prove the truth of its contents and that it provides evidence that when George was swimming at the river, the appellant and Lynne were seen going towards Highway 8. We do not go so far as to accept that the third statement could constitute evidence that the appellant and Lynne were actually seen by an undetermined speaker heading north towards the highway. We do agree, however, that at a hypothetical new trial, the defence could use this part of the third statement in cross-examining George.

[560] George was adamant at trial that he told the police the truth in his third statement. He acknowledged that he used that statement to help him refresh his memory on the witness stand. The defence could use this statement to attempt to establish through George that someone at the river said they had seen the appellant with Lynne going north towards Highway 8 while George was swimming there at some time after 7:20 p.m. and before 8:30 p.m. on June 9.[35] Evidence from George to the effect that someone made this comment while he was at the river would be admissible to rebut the Crown's contention that, after it was known that Lynne was missing, the appellant manufactured the story that he took her to the highway and then enlisted his friends to lie for him in support of that story.

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[35] These times are from George's third statement and his trial evidence.

[561] The comment referred to in George's third statement, which he said was made while he was swimming at the river on June 9, would make it implausible to suggest that the appellant invented the story about taking Lynne to the highway in order to mislead the police and to hide his own involvement in her disappearance. To maintain that theory in light of this evidence, the Crown would have to argue that the appellant had the good fortune to make up a story that was consistent with a mistaken identification of him and Lynne, of which the appellant was unaware, and which was made at a time before anyone had any reason to think that the comings and goings of the appellant and Lynne over the bridge were of any significance.

**(iii) Conclusion on the three statements of Arnold George**

[562] In summary, we are satisfied that the statements of Arnold George discovered in the archives are among the most significant pieces of new information brought forward by the appellant. George was an important Crown witness. The new material has powerful impeachment potential. George's unconfirmed and unsupported evidence that the appellant asked him to lie for him and that the appellant admitted being at the side of Lawson's Bush with Lynne looking for a cow and calf could well be rejected at a hypothetical new trial where the appellant could more fully and effectively explore George's credibility.

**2. The Appellant's Alleged Fabrication of a Story that he saw Lynne get into a Vehicle at the Highway**

**(i) Trial evidence**

[563] In his statements and in his evidence before the Supreme Court, the appellant consistently maintained that he and Lynne met at the school grounds and that, at her request, he took her north on his bike on the County Road across the bridge to the intersection of Highway 8, where he dropped her off. He then returned alone to the bridge, a distance of 1300 feet from the intersection. After he arrived there, he turned around and saw Lynne get into the front seat of a car that had stopped to pick her up. According to the appellant, the car was facing in a north-easterly direction. Once Lynne got in, the car drove off in an easterly direction on Highway 8. The appellant did not see Lynne again.

[564] The appellant described the car as a grey, late-model Chevrolet, possibly a Bellair model, with a lot of chrome on it. It had whitewall tires and appeared to have a yellow licence plate. He saw no one in the back seat of the car and was unable to see how many people were in the front.

[565] At trial, the Crown maintained that it was physically impossible for the appellant to see what he claimed to have seen and that he deliberately fabricated the story to mislead the police. The Crown, relying on the old adage about the value of pictures, introduced a series of photographs through Corporal Erskine (see Appendix 6). These photographs purportedly depicted the view of the intersection of Highway 8 and the

County Road from the appellant's vantage point on the bridge. For the purpose of these photographs, the police placed a car at the intersection.

[566] Suffice it to say that if the photographs accurately depicted what one could see with the naked eye from where the appellant was standing on the bridge, the photographs rendered laughable the appellant's claim that he saw Lynne get picked up by a grey Chevrolet with a yellow licence plate. Most tellingly, when one of the photographs was filed as an exhibit at the trial, the trial judge proclaimed "I can't even see the car in the picture." The trial judge then asked Corporal Erskine if he could see the car, to which the Corporal responded, "I can see the outline, my lord."

[567] As indicated, if the photographs accurately depicted what could be seen with the naked eye from the bridge, the appellant was clearly lying. With the benefit of the evidence called on the first Reference, we know, however, that the photographs introduced at trial were misleading. Professor Henderson, an engineering professor and an expert on light and vision, testified at the first Reference that the trial photographs were highly distorted and were not close to an accurate depiction of what a person could see from the bridge. Based on Professor Henderson's evidence, it is likely that if the Crown attempted to introduce these photographs at a hypothetical new trial, they would be excluded as having no probative value and high prejudicial potential.

[568] On the first Reference, the appellant did not, however, introduce accurate photographs. Instead, the appellant led evidence from three private investigators

regarding certain visibility experiments they conducted. We will say more about this evidence below.

[569] In addition to the photographs, the second prong of the Crown's attack at trial on the appellant's ability to see what he claimed to have seen came from the testimony of Constable Trumbley. On Wednesday, June 10 shortly before 5:00 p.m., Constable Trumbley accompanied the appellant and his mother to the bridge. The appellant showed him where he said he was standing when he saw the vehicle stop and pick up Lynne. Constable Trumbley stood there and made his own observations. He testified as follows:

> A. As I was standing [on the bridge], a grey car with Ontario licence passed over the bridge and proceeded towards Number Eight Highway. I fixed my eyes on the licence plates, and as the car drew further away towards Number Eight Highway, the licence plates kept getting smaller and when the car stopped at Number Eight Highway, I couldn't see the licence plates at all.
>
> His Lordship: Q. At Number Eight you couldn't see the licence plate at all. Is that what you said?
>
> A. Yes, my lord.

[570] Constable Trumbley further testified that when he and the appellant returned to the police car where the appellant's mother was seated, Trumbley said that he "couldn't see any licence plates at all", to which Mrs. Truscott responded, "Maybe it was one of those yellow stickers like we have on our car from Fairyland Gardens."

**(ii) Closing arguments**

[571] In closing submissions to the jury on the issue of the appellant's ability to see the licence plate, Crown counsel concentrated largely on the photographs and invited the jury to look at them and "figure out whether you can see anything, a sticker or otherwise." He also impressed upon the jury the efforts that the police had made to ensure, out of fairness, that the car in the photographs was the same model as the car identified by the appellant, that it had yellow licence plates, and "that a real effort was made to put the licence plate in a place that could be seen, as favourably as possible."

**(iii) Trial judge's charge to the jury**

[572] The trial judge focused the jury's attention on both the photographs and Constable Trumbley's evidence. In one of several recharges, he instructed the jury as follows:

> You will recall the Police went down and took photographs of the car, took photographs of the road with a car at the end of the road, and a car at Number Eight Highway, and they ask you to find from that and from the evidence of the Police officers, themselves, *that it would have been impossible to have seen the licence plate of the car from the bridge* and therefore, the story told by the accused is a fabrication. [Emphasis added.]

**(iv) Evidence on the first Reference**

[573] As indicated, on the first Reference, Mr. Martin led evidence from three private investigators who conducted tests at the bridge at 7:30 p.m. on June 10, 1966. They reported that a person standing on the bridge could see the colour of a licence plate, including a yellow one, on a test car that was facing in a north-easterly direction and

parked at the intersection of the County Road and Highway 8. In addition, Professor Henderson testified that on the afternoon of July 24, 1966, he went to the bridge and observed cars stopped at the intersection. He said he had "no problem" in discerning makes and models of cars and that he could also discern the colour of licence plates, including a yellow one, of cars stopped at the intersection.

[574] Crown counsel on the first Reference did not challenge that evidence. Rather, counsel stressed that the tests conducted by the private investigators were under optimal conditions, with the car being placed:

> … in the precise position where the rays of the sun were coming from the west and … [they] hit the licence plate at an angle which would cause the reflection to go directly down the County Road toward the bridge … [such that] the licence plate could be in acting like a mirror down the road to make it distinguishable or visible at all.

[575] In their reasons, the majority of the Supreme Court made no mention of Professor Henderson's evidence regarding his ability to discern the makes of cars at the intersection and the colour of their licence plates. As for the test conducted by the private investigators, the majority minimized its significance and essentially adopted the Crown's submissions (at p. 301):

> The evidence given on the Reference proves no more than this, that if a car is placed in this position [a north-easterly position where it would catch the late afternoon sun] at a certain time with the sun shining on the licence plate, an investigator standing at the bridge and knowing what he was looking for could identify colours, but not entirely without error.

[576] In the end, while the majority accepted that the new evidence concerning the appellant's ability to see what he claimed to have seen was somewhat more favourable than the evidence presented at trial, they determined that it really did not matter since "[t]he purpose of that evidence at trial … was to attack the credibility of Truscott on this important part of his defence." Having heard and rejected the appellant's testimony, the majority concluded that "the evidence given at the Reference in relation to the possibility of making the observation of an automobile so placed becomes of much less importance."

**(v) Impact of the new and archival material on the visibility issue**

[577] We begin our analysis with the observation that while we accept the Supreme Court's credibility assessment of the appellant's evidence as given before that court in 1966, that assessment does not assist in our consideration of the visibility issue. We do not regard the appellant's credibility at the first Reference as relevant to, much less determinative of, this issue.

[578] The credibility of the appellant's version of events, as told to the police shortly after Lynne's disappearance and as placed in evidence by the Crown, is certainly very much in issue before us. The credibility of the appellant's version of events must, however, be assessed in the light of the entire record and the additional material that has been presented in these proceedings. We cannot avoid considering the significance of the issue of the appellant's ability to see the details of a car at the intersection by simply assuming that because his evidence was not credible in 1966, it follows that he was not standing on the bridge on June 9, 1959.

[579] By way of new evidence, the appellant tendered a series of photographs taken in 2001 that accurately depict the view of a car parked at the intersection as seen from the appellant's vantage point on the bridge (see Appendix 7). To the extent that these "life-size" photographs were tendered to show that the appellant would have been able to make out the colour of a car's licence plate at the intersection, they do not achieve such a goal. The positioning of the vehicles in the photographs is such that the licence plates cannot be seen.

[580] That fact, however, is not fatal to the appellant's claim. The issue is not whether the licence plate is visible on the vehicle in the picture, but whether it may have been visible to the appellant on the vehicle he claimed to see on the evening of June 9. While the modern-day photographs do not assist him in that regard, we do not believe that they were meant to bear that burden. What these photographs do show in stark terms is just how unfair and misleading the photographs introduced at the appellant's trial truly were. They also make it clear that someone standing on the bridge, with some familiarity of cars, could readily identify the model of a car at the intersection. In the end, while we find the new photographs helpful, we would not characterize them as particularly compelling evidence standing alone.

[581] Of more significance to the issue of the appellant's ability to discern the colour of the licence plate are the results of visibility tests conducted by the police in preparation for the 1966 Reference. The Crown Attorneys on the 1966 Reference chose not to tender these test results to the Supreme Court. We mention that not to be critical, but to explain

why we are the first court to see them. That said, we hasten to point out that even if the test results had been tendered to the Supreme Court, we doubt that they would have had any impact on the outcome of the first Reference in light of the majority's credibility finding against the appellant on the record before that court.

[582] The test results are described in two reports that appellant's counsel located in the archives. The first report, prepared by Corporal Hardy, is dated July 15, 1966. It was directed to Inspector Ferguson of the O.P.P. Criminal Investigation Branch in Toronto. In it, Corporal Hardy recorded his observations of six tests performed on July 14, 1966 in which he stood on the bridge and attempted to pick out the colour of the licence plate on a 1959 grey Chevrolet driven by Constable Twaddle. For each test, a different coloured plate was put on the car and Constable Twaddle re-enacted the appellant's description of the movement of the car that he claimed had picked up Lynne.

[583] In four of the six tests, Corporal Hardy reported that he was able to discern what appeared to him to be the colour of the licence plate. Below is a chart of the four tests in which he claimed he could do so. It sets out the times of his observations and compares the colours he recorded to the actual colour of the plates:

| **Time of Cpl. Hardy's observations** | **Cpl. Hardy's visual observations** | **The actual colour of the licence plate on the 1959 Chevrolet** |
|---|---|---|
| 7:08 p.m. | Orange coloured | Red background, white letters |
| 7:21 p.m | Appeared to be orange | Black background, yellow letters |

| | | |
|---|---|---|
| 7:30 p.m. | Either orange or possibly yellow | Yellow background, black letters |
| 7:56 p.m. | White licence plate | White background, red letters |

[584] The second report found in the archives, dated July 25, 1966, was prepared by Inspector Ferguson and directed to Assistant Commissioner Graham (formerly Inspector Graham). It referred to the same tests with the 1959 grey Chevrolet that were conducted on July 14, 1966, but it only recorded the observations of William Macdonald and Ahmad Sahibzada, two non-O.P.P. government employees who conducted the tests along with Corporal Hardy. Messrs. Macdonald and Sahibzada reported that they could not make out the colour of the licence plate in any of their attempts.

[585] There is no dispute between the parties about the reliability of the contents of Corporal Hardy's report. We are satisfied that the information found in it could be useful to the appellant at a hypothetical new trial. We agree with the appellant that the visibility issue really embraces two issues. First, there is the question of what the appellant actually saw and, second, there is the question of what he reasonably believed he saw. If the visibility evidence is such that the appellant could reasonably have thought he saw a yellow licence plate, then the Crown's claim that he fabricated this story is undercut even if, in the end, the appellant was wrong about the colour of the licence plate.

[586] Corporal Hardy's report makes the case that the appellant could reasonably have believed that he saw a yellow licence plate. In four of the six tests he performed, Constable Hardy believed (in some cases correctly and in others incorrectly) that he

could make out the colour of the test car's licence plate. If it was reasonably possible for Constable Hardy to make these observations, then the Crown's claim that the appellant could not possibly have made these observations loses its force.

[587] Corporal Hardy's report could be quite significant at a hypothetical new trial. It would provide further evidence to support the appellant's claim as to what he saw from the bridge. And it would have additional force in that it would come from a police officer who had no reason to provide favourable evidence for the defence. It would also provide a counterweight to the Crown's argument at the first Reference that the colour of the licence plate of a car could be observed only if it was in a precise location at a precise time of day. Faced with Constable Hardy's report, the Crown would certainly have to modify its claim that it was "physically impossible" for the appellant to see what he said he saw.

### 3. The Appellant's Alleged Admissions to George and Other Children Concerning Lynne and Lawson's Bush

[588] We have already dealt with the statement that the appellant allegedly made to George on the evening of June 9 to the effect that he was at or near Lawson's Bush with Lynne looking for a cow and calf. For reasons set out earlier, the veracity of that part of George's evidence would be open to serious question at a hypothetical new trial.

[589] The evidence of the statements made by the appellant to other boys will be summarized below (see Section E, *infra*). We do not propose to review it now because the archival material does not significantly alter the impact of this evidence.

[590] For reasons we will set out below (see Section E), the statements to these boys have some limited value as admissions for the Crown. None of the statements put the appellant in Lawson's Bush with Lynne. However, the statements do put the appellant in or near Lawson's Bush on Tuesday evening. They thus support the contention that he was not being candid in describing his whereabouts in his various statements to the police in the days following Lynne's disappearance.

## THE FOURTH PILLAR OF THE CROWN'S CASE: THE PENIS LESIONS EVIDENCE

### (i) Introduction

[591] The fourth and final pillar of the Crown's case, which we refer to as the penis lesions evidence, consisted of medical evidence indicating that Lynne Harper was raped and that sores on the appellant's penis were consistent with him having raped her. While this evidence was a relatively small part of the Crown's case, its simplicity and graphic nature combined with its apparently impeccable source, three doctors, made it potentially very powerful incriminating evidence.

[592] For reasons that we will explain, that body of evidence has changed dramatically. At a hypothetical new trial, the penis lesions evidence would have so little probative value that it could potentially be excluded by the trial judge on the basis that its prejudicial potential outweighs its probative value.

**(ii) Trial evidence**

[593] Dr. Penistan testified that on his examination of Lynne Harper's body, he observed that the outer labia of the vagina had been injured and that the injury "might possibly have been produced by a blind, violent thrust of the male organ in the direction of the entry to the vagina."

[594] Dr. Joseph Addison performed a medical examination of the appellant on the night of June 12, 1959, shortly before he was arrested. At trial, Dr. Addison testified that the distal end of the appellant's penis appeared swollen and slightly reddened. On closer examination, he observed two large raw sores that were "like a brush burn of two or three days duration." These sores were raw and oozing serum and were roughly the size of a quarter. He said that he had never seen a penis that looked as sore as the appellant's any time in his twenty some years of practice, other than in a case of cancer and a case where a penis had been stepped on by a cow.

[595] Dr. Addison testified that the appellant's penis lesions must have been caused by "friction in an oval shaped orifice" such as an "oval shaped knothole or something like that." The Crown asked, "[i]s there anything inconsistent with these [sores] having been caused by the entry of the male organ into the private parts of a young, small virgin?", to which Dr. Addison responded, "There is nothing inconsistent with it, sir." In cross-examination, Dr. Addison maintained that the only potential cause for the lesions that he observed was the insertion of the erect penis into a tight orifice.

[596] Dr. Brooks was present for part of Dr. Addison's examination of the appellant on June 12. He testified at trial that he observed lesions on both sides of the shaft of the appellant's penis, which were each "just bigger than a twenty-five cent piece" and that were oozing. He compared them to a blister from a burn that burst and then the blister was pulled away. Dr. Brooks claimed this was "the worst lesion of this nature that I have ever seen … [in] twenty years of medicine."

[597] Dr. Brooks was asked for his estimate of when the lesions were caused. He responded, "[b]etween sixty and eighty hours before [the examination], I should think, about that time." The temporal aspect was emphasized by a subsequent question from the Crown:

> Q. [Mr. Hays]: Would it [the condition of the appellant's penis] be consistent ,... I say, with having happened on the night of Tuesday, June 9th?
>
> A. Yes, it is entirely consistent with that length of time.

[598] When asked for his opinion on the cause of the lesions, Dr. Brooks testified:

> My opinion on this, is that the lesion was caused by the pushing, insertion of an erect -- of that erect organ into a very narrow orifice. And if this had been an older woman without a hymen, this injury would not have occurred.

[599] Dr. Brooks contrasted inserting the erect penis into a bigger orifice, which could not have caused these injuries, with penetrating the genitals of the deceased, "a girl of tender years, who had not yet reached full maturity. She would have an entranceway barred by this hymen, which is something through which you cannot normally insert a

little finger." He described the injuries observed in Lynne Harper's genital area as being indicative of "…a very inexpert attempt at penetration."

[600] The defence expert, Dr. Brown, challenged the opinions of Drs. Addison and Brooks on the cause of the lesions. He testified that it would be "highly unlikely" that vaginal penetration would produce lesions like those described. He said that the penis is rarely injured in a rape and, when it is, any trauma caused by penetration would normally injure the head, not the shaft of the penis. He agreed in cross-examination, however, that the doctors who performed the actual examination were in a better position to ascribe the possible cause of the injury.

**(iii) Closing arguments**

[601] In his closing argument, defence counsel questioned the plausibility of Drs. Addison's and Brooks' contention that the penis lesions were caused by the penetration of Lynne Harper, arguing that there was nothing sufficiently rough in the vaginal area to cause the brush burn type of injury they had observed. Mr. Donnelly emphasized the credibility of Dr. Brown as a physician who had practised medicine in the army and who had experience with rape cases. He urged the jury to accept Dr. Brown's testimony that it is rare to find lesions on the penis in a rape case. He also offered various alternative explanations for the lesions, including masturbation.

[602] In Crown counsel's closing, he referred to the evidence of Drs. Addison and Brooks in these terms:

> … both those men pledged their opinion in that box, that the injuries to the accused's private parts were such as could have been caused by penetration of a young twelve year old girl's private parts, and they went further, that observing these wounds, they would give their opinion they were from two to three days' old…. With those two doctors giving that opinion, that those injuries could have been caused by the indecent assault of this twelve year old girl, at the time she was assaulted, and that is important. The degree of healing, they give it as two or three days before. One of them may have said three or four, but they both fitted it in point of time and doesn't that observation of theirs on the time that these were incurred, narrow the gap even more than their statement as to what could have caused them?
>
> …
>
> Well now, on that subject of the sore penis and its evidence, and the defence recognizes it, from what you heard Mr. Donnelly say, pretty damning evidence that the accused - relating to the accused's indecent assault on the girl at that time, and such injuries could have been caused by just the thing that was done to her.

[603] The Crown reminded the jury that the defence expert, Dr. Brown, was not present during the appellant's examination and had not seen the lesions. Accordingly, he submitted that Dr. Brown's evidence could not "throw any shadow of doubt on the opinions of Doctor Addison and Doctor Brooks as to the cause and time that I have gone over."

**(iv) Trial judge's charge to the jury**

[604] In his initial instructions to the jury, the trial judge did not refer to the penis lesions evidence. In response to a Crown objection to this omission, the trial judge recharged the jury in this way:

> Now, I overlooked an important point. Doctor Addison and Doctor Brooks examined this boy physically at the Guard House on the night of Thursday, the 12th, late at night. In fact, it was really Friday morning before they finished. They found minor scratches on his elbows, and on his knees, nothing to amount to anything, but there were little marks there which would be consistent with abrasions received during the attack of this girl. It would be consistent with that. They also, you have heard, found these two big lesions, one on each side of the boy's penis. He is circumcised, at least in part. The Crown says that is certainly consistent with this boy having attacked this type of girl, a girl in whom, under normal circumstances, Dr. Brooks says, you couldn't enter the end of your little finger. The Crown relies on the lesions as demonstrating that the whole evidence connects the boy with the girl who was so badly injured. The lesion on her, and what is more important, the damage to the hymen and the damage to the entrance are on the evidence of the doctor who testified for the Crown, injuries which are perfectly consistent with a boy, who is really a man, attempting to have intercourse with a young child of the girl's age.

[605] The defence objected to the recharge and the trial judge further charged the jury:

> …I should have said that the defence theory about the lesions on the boy's penis, is, of course, that they were caused by masturbation or could have been caused by masturbation. They could have been caused by any roughness or a knothole or any mechanical device or anything of that kind. Doctor Brown gave it as his view that they could not have been caused by intercourse with this girl. Now, that is a matter that you will have to decide for yourselves and you will use your own common sense as to that phase of it. You will recall, of course, the medical evidence about those lesions, about their condition, about the degree of healing and they weren't really bleeding and they weren't really scabbed. There was a serum and Doctor Brooks and Doctor Addison gave it as their opinion that they were consistent with having been incurred two or three days previous to the examination. Doctor Brown said he did not think they could have been incurred by an

> attack on this particular girl. That is what he said. Which view do you accept? That is for you to decide.

**(v) Evidence at the 1966 Reference**

[606] At the first Reference, Mr. Martin launched a vigorous and successful attack on the Crown's penis lesions evidence. He called four experts, each of whom testified that the lesions described on the appellant's penis near the time of his arrest were not consistent with having been caused by sexual intercourse.

[607] The defence experts agreed that the nature and location of the lesions made it highly improbable that they were caused by sexual intercourse. For example, Dr. Norman Wrong, a specialist in dermatology, testified that the lesions were indicative of many dermatological conditions. He had seen many diseases where blisters of that kind could appear. According to Dr. Wrong, "these lesions are not diagnostic of any one specific thing" and that it is "extremely unlikely" to have such an injury caused by intercourse or attempted intercourse.

[608] The only evidence called by the Crown on the first Reference relating to the penis lesions came from the pathologist, Dr. Simpson. He agreed that the sores were "not the ordinary kind of injury one sees in forcible or difficult sexual intercourse." Dr. Simpson went on, however, to say that there was a possibility that the sores pre-existed the sexual intercourse and were aggravated by sexual intercourse, causing them to become "more sore or to weep or crust."

[609] In cross-examination by Mr. Martin, Dr. Simpson accepted that the lesions could also have been caused by a skin condition complicated by irritation from clothing or from a secondary infection.

[610] By the completion of the first Reference, the evidence had gone from an opinion that the penis lesions were consistent with having been caused by forced intercourse two or three days before the appellant's arrest, to an opinion that it was highly unlikely that the penis lesions were caused by sexual intercourse. The majority of the Supreme Court of Canada did not allude to this significant change in the evidence. Instead, the majority focused on whether there was evidence before them that the appellant had a pre-existing skin condition that could have been aggravated by forced sexual intercourse. The majority concluded at p. 344:

> Our conclusion is that there was a pre-existing condition and that it was disclosed by him [the appellant] prior to his trial, although no evidence about it was given before the jury. The serious condition found and described by Dr. Addison and Dr. Brooks was consistent with the aggravation of a pre-existing condition resulting from a sexual assault upon Lynne Harper.

**(vi) Additional material on penis lesions relied on at this Reference**

[611] The appellant tendered archival documents and a further expert opinion concerning the penis lesions. We need not describe the archival documents because in our view, they do not advance the appellant's case.

[612] Dr. Donald Rosenthal, a professor of medicine and head of the Division of Dermatology at McMaster University, prepared a report for the appellant dated

November 20, 2001 and testified before Mr. Kaufman in 2002 and 2003. His evidence, which was not challenged by the Crown by way of cross-examination, is part of the record in these proceedings.

[613] Dr. Rosenthal essentially agreed with the experts called on the appellant's behalf at the first Reference. In his report, he addressed the opinion of the Crown's witness, Dr. Simpson, as follows:

> Dr. Simpson in his testimony of 1966 suggested that these lesions could have stemmed from a pre-existing condition aggravated by sexual assault. I would agree that this is a possibility. However, it was not exclusively or especially consistent with that.

**(vii) Penis lesions evidence at a hypothetical new trial**

[614] At a hypothetical new trial, the evidence regarding the penis lesions would justify the following conclusions:

- it is highly unlikely that the penis lesions were caused by an act of sexual intercourse;
- the lesions were consistent with the aggravation of a pre-existing skin condition;
- sexual intercourse was one of many possible causes of that aggravation; and
- there is nothing that points to sexual intercourse as a more likely cause than any of the other possible causes.

[615] As it currently stands, the penis lesions evidence is close to no evidence at all. At best, the Crown at a hypothetical new trial could argue that it was possible that the penis lesions were the result of a pre-existing skin condition that was aggravated by the sexual assault of Lynne Harper. The Crown would have to concede that it was equally, if not more, possible that the lesions were the result of any number of innocent explanations.

[616] The graphic nature of the penis lesions evidence carries with it some possibility of prejudice to the appellant, although it must be said that the evidence called on the first Reference and Dr. Rosenthal's evidence would go a long way to eliminating the potential prejudice from the evidence.

[617] For purposes of considering the appropriate remedy, it is unnecessary for us to come to any conclusion as to the relative probative value and prejudicial potential of this evidence. It is sufficient to say that the penis lesions evidence as presently constituted would do little, if anything, to advance the Crown's case at a hypothetical new trial.

## C. THE CASE FOR THE DEFENCE AT A HYPOTHETICAL NEW TRIAL

[618] We now turn to the case for the defence. We discuss the defence case as it was presented at the trial in 1959 and we examine how archival and photographic material brought forward in these proceedings could affect the case for the defence at a hypothetical new trial.

[619] As we have said, the appellant's version of the events of the evening of June 9 was presented at trial through a series of statements that he made to the police in the days following Lynne's disappearance and after her body was found.

[620] Critical to the appellant's version of events was his claim that he and Lynne crossed the bridge on their way to Highway 8. If they did cross the bridge, then it is virtually certain that he was not Lynne's killer; if they did not cross the bridge, then it is virtually certain that he turned off the County Road with Lynne onto the tractor trail and into Lawson's Bush where he killed her.

[621] The defence called three children whose evidence supported the appellant's exculpatory version of events. Gordon Logan (age thirteen), Doug Oates (age twelve), and Alan Oates (age sixteen) testified for the defence. Another child, Karen Daum (age nine), figures prominently in the defence submissions in these proceedings. She did not testify at trial or at the 1966 Reference. She did, however, provide a signed statement to the police within days of Lynne's disappearance, which if true, supports the appellant's version of events.

[622] Karen Daum (her married name is Jutzi, but for convenience we use the name Daum) testified before Mr. Kaufman in 2002 and before this court in 2006. Her present recollection of the material events of June 9, 1959 differs markedly from the content of her statement given very shortly after the relevant events. The appellant asks this court to

admit Daum's 1959 statement for its truth. We examine that submission in more detail below.

[623] We begin our assessment of the effect of the new material on the defence case by considering the evidence of Gordon Logan and Doug Oates. We review their evidence at trial and the means used by the Crown to attack their credibility and the reliability of their evidence. We then turn to an assessment of how the archival and new photographic material could be used at a hypothetical new trial to support the reliability of their evidence and to counter the Crown's attack at trial.

## 1. Impact of the Additional Material on the Evidence of Gordon Logan and Doug Oates

### Gordon Logan

[624] Gordon Logan was in the same Grade 7 class as Lynne and the appellant. He was twelve years old when Lynne was murdered and had turned thirteen by the time of the trial. He was an important defence witness.

[625] Logan testified that after doing his paper route on the evening of Tuesday, June 9, he went to Arnold George's house and then to the appellant's house because they had talked earlier in the day about going swimming at a gravel pit. Neither George nor the appellant were home. Logan started to walk towards the river. He met Richard Gellatly, who gave him a ride on his bicycle. As Logan and Gellatly rode past the school grounds, Logan saw the appellant on his bike. They spoke briefly. The appellant told Logan he did not think he would be going to the gravel pit to swim, but that he might see Logan

later down at the river. Gellatly and Logan then rode down the County Road towards the river on Gellatly's bike. They arrived at the river at around 7:00 p.m. Logan said that he went in swimming and Gellatly went home to get his bathing suit.

[626] Logan swam until about 7:30 p.m. Just after he got out of the river, and while he was standing on a rock near a bend in the river, he saw the appellant and Lynne riding across the bridge on the appellant's green racer bike. Logan could not recall what the appellant was wearing, but he believed that Lynne was wearing shorts. He lost sight of them just as they came to the north end of the bridge. They were headed north towards Highway 8.

[627] Logan next saw the appellant about five minutes later riding south towards the bridge alone on his bike. He saw the appellant stop at the bridge and get off of his bicycle. He did not notice what the appellant did after that.

[628] In cross-examination, Logan agreed that he saw the appellant at the school at about 6:50 p.m. Logan named the boys whom he remembered being at the swimming hole that evening. He agreed that Arnold George was at the swimming hole. He said he was not sure if George was there when he saw the appellant and Lynne cross the bridge going north. Logan believed that George was there when he saw the appellant return to the bridge alone.

[629] Logan said that when he saw the appellant and Lynne cross the bridge, he did not say anything to any of the boys. He specifically denied having said to the other boys in

the area: "There goes Steven and Lynne Harper." He also denied having said: "There is Steven down there at the bridge."

[630] In cross-examination, the Crown tried to establish that Logan would not have been able to identify people on the bridge from his location on the rock in the river. Logan insisted that he could do so.

[631] In reply, the Crown called evidence that the distance to the bridge from Logan's position in the river was about 642 feet (196 metres). The Crown also called evidence that there was a forty inch (102 centimetres) cement wall along the side of the bridge, which would interfere with the sightline from the river to the bridge. The Crown next attempted to elicit evidence from other witnesses to the effect that they could not recognize individuals standing on the bridge from the area where Logan was standing. The trial judge reacted somewhat sceptically to this evidence and under his questioning, the witnesses agreed that if they knew the person or persons standing on the bridge, they could probably recognize them from the river at a distance of 600 feet or more.

[632] In his closing argument, Crown counsel urged the jury to conclude that Gordon Logan was "simply… not telling the truth". The Crown did not allege that he was not at the river at the relevant time, but rather argued that he did not see the appellant cross the bridge with Lynne or see him return alone.

[633] Crown counsel advanced two main arguments in support of his submission that Logan could not be believed. First, the Crown submitted that it was unlikely that Logan

could recognize people on the bridge given the distance from the rock to the bridge, as well as the sightline from the river looking up to the bridge and the position of the cement wall railing on the bridge. Second, the Crown depicted Logan as a liar by association. The Crown contended that Logan, like Arnold George, had been asked by the appellant to lie to the police and that Logan had agreed to do so. The Crown put it this way:

> I submitted and I submit again, that he [Logan] is part and parcel with the Steven Truscott, Butch George conspiracy. Again I repeat, the evidence, that George was talked into by the accused of telling the Police a false story that he had seen Steven and Lynne going to the highway. … I suggest again that Gordon Logan, you can take from the sworn evidence before you, that Gordon Logan got in on the same deal to tell the Police a false story, but unlike George, he stuck to it.

[634] As we have discussed above, Arnold George testified that the appellant had asked him to lie to the police. There was no evidence, however, that the appellant had also asked Logan to do so. The Crown's argument rested entirely on the claim that since the appellant had asked George to lie for him, the jury could infer that he had also asked Logan to lie for him.

[635] On the first Reference, the appellant called evidence from two private investigators and an engineering professor to support Logan's evidence that he could see and identify people on the bridge from his location on the rock in the river. We need not detail that evidence. It is sufficient to say that the three defence witnesses on the first Reference said they could see individuals standing on the bridge and could identify the

colour of their clothing. One of the three witnesses said that he could recognize the people on the bridge. They were members of his family.

[636] Leading up to the first Reference, the Crown had several police officers conduct tests to determine whether a person standing where Logan was standing could identify people on the bridge. One officer reported that it was possible to recognize people standing on the bridge if they were previously known to the observer. Another officer reported that it was impossible to identify anyone on the bridge.

[637] The Crown did not introduce these reports on the first Reference. The appellant has since retrieved them from the archives. They are not materially different from the evidence provided by the defence witnesses at the first Reference, nor are they significantly different from the evidence adduced at trial. We do not think that the two reports prepared by the police officers in connection with the first Reference would assist in resolving the debate at trial and at the first Reference as to whether a person standing where Logan was standing could recognize someone on the bridge.

[638] It was open to the Crown at trial to argue that Logan could not have recognized the appellant or Lynne from where he was standing on the rock. It was open to the defence to argue that Logan could recognize them. This was a question for the jury to decide. The Crown's attack on Logan's credibility based on the contention that he could not recognize people on the bridge remains a tenable, albeit not a very powerful, one.

[639] The jury did not see any actual photographs of the bridge taken from Logan's vantage point. On the first Reference, the Crown introduced photographs that purported to depict what Logan's view of the bridge would have been (see Appendix 8). These photographs would suggest that it was unlikely that a person standing where Logan was standing could recognize someone on the bridge. On this Reference, the appellant introduced photographs taken in 2001 of a person standing on the bridge as viewed from Logan's position on the rock in the river (see Appendix 9).

[640] The appellant describes these photographs as "life-size" depictions of what a person can see from Logan's vantage point. The photographs accurately reproduce the actual distance of objects as they appear from the location where Logan was standing. These photographs are much clearer than the ones tendered on the first Reference and the bridge appears much closer. However, the new photographs do not ultimately resolve the question of whether Logan could have recognized someone on the bridge from where he was standing on the rock. Nonetheless, at a hypothetical new trial, the defence would be armed with photographic evidence that would significantly enhance the defence position that Gordon Logan could have recognized the appellant and Lynne, both of whom were known to him, while they rode across the bridge.

[641] The second attack by the Crown on Logan's credibility, and probably the more effective one, involved a linking of George, Logan and the appellant in a conspiracy to fabricate an exculpatory statement for the appellant. Assuming the Crown could properly even make this liar by association argument, unsupported as it was by any evidence, the

argument had validity only if the jury believed George's evidence that the appellant had asked him to lie to the police for him. For the reasons set out above, the chances that a jury would accept that part of George's evidence at a hypothetical new trial are diminished by the archival material discussed. If at a hypothetical new trial, a jury were to reject George's testimony that the appellant asked him to lie to the police, the Crown's argument that Logan was "part and parcel of the Steven Truscott, Butch George conspiracy" would necessarily fall on deaf ears.

[642] Without the argument that Logan was part of a conspiracy to lie for the appellant, the Crown's attack on Logan's credibility rested entirely on the inconclusive evidence regarding his ability to recognize someone standing on the bridge from where he was in the river. We think it would be much less likely that a jury would reject outright Logan's evidence if they had no basis for concluding that he had deliberately lied about seeing the appellant. If at a hypothetical new trial, Logan's evidence were to remain intact, even if only to the level of leaving the jury with a reasonable doubt as to the veracity of his evidence, the appellant would be entitled to an acquittal.

**Doug Oates**

**(i) Oates' evidence at trial**

[643] Doug Oates (age twelve) testified that after dinner on the evening of June 9, he cycled to the bridge and began looking for turtles. Ronald Demaray (age seventeen) was fishing from the bridge when Oates arrived. Demaray used his fishing rod to help Oates catch a turtle and then Demaray put the turtle in Karen Daum's bicycle carrier. As

Demaray was getting ready to leave for home, Oates spotted a small turtle and "went down to the bottom of the bridge and grabbed it." When he returned to the "top of the bridge", Demaray asked for the small turtle and he gave Oates two larger ones in return. Demaray then put the little turtle in a bag and left for home.

[644] Demaray testified that it was around this time that he noticed the appellant alone on the bridge. The appellant was just looking around. Demaray did not know the precise time, "but it was just before I went home, and I believe I got home between six-thirty and seven." Oates testified that he did not see the appellant at that time.

[645] After Demaray left, Oates said he remained at the bridge and he and Karen Daum looked for more turtles. Sometime after 7:00 p.m., when Oates was standing on the east side of the bridge, he said he saw the appellant and Lynne cycle by. They were riding on the east side of the County Road and Lynne was on the crossbar, facing east. Oates said "hi" as they passed and waved to them. Lynne smiled but the appellant did not respond. Oates thought that the appellant did not notice him. When Oates last observed them, they were north of the bridge heading towards Highway 8. He did not see Lynne or the appellant again that night.

[646] Oates was asked by the Crown in cross-examination where Karen Daum was when the appellant rode by. Oates replied that he thought "she must have been just coming up the hill from the … river to the bridge" and "she just got there a bit after Steve and Lynne

went by." Although he could not say for sure, he did not think that she had seen them go by.

[647] Also in cross-examination, Oates testified that after seeing the appellant and Lynne go by, he and Daum remained at the bridge for "maybe about ten or fifteen minutes" looking for more turtles. He and Daum left the bridge on their bikes and began to ride towards their homes at the Station. Along the way, they stopped at the railway tracks and he broke the claws off a turtle that had been run over by a car. Oates estimated that he arrived home at about 7:45 p.m.

[648] The Crown attacked Oates' evidence by attempting to show that he had left the bridge for home shortly after 6:30 p.m. and was not at the bridge between 7:00 and 7:30 p.m. That being so, if he saw the appellant at all that evening, it must have been around 6:30 p.m. when various people including Ron Demaray and Mrs. Geiger saw the appellant at the bridge alone on his bicycle.

[649] In trying to extract from Oates a concession to this effect, Crown counsel cross-examined him on an unsigned statement that he had provided to Inspector Graham and Constable Trumbley at the R.C.A.F. Guard House on June 13. In that statement, Oates is reported to have said that when he saw "Steve and Lynne ride by … it might have been about 7 o'clock, I don't know the time *but I think a half hour either way from 7 o'clock.*" [Emphasis added.] Crown counsel focused on the words "a half hour either way" in order to show that Oates had seen the appellant at the bridge closer to 6:30 p.m., when the

appellant was alone on his bicycle, rather than between 7:00 and 7:30 p.m., the time frame when he would have been with Lynne.

[650] In a rigorous cross-examination on the issue of what time Oates told the police that he saw the appellant and Lynne go by, Oates denied having said that it could have been "a half hour either way from 7:00 p.m." Rather, he maintained that he told Inspector Graham that it would be "somewhere between seven and half an hour later" when he saw them. With Inspector Graham seated nearby in the courtroom, Crown counsel questioned Oates as follows:

> *Q.* *You told the Inspector sitting here, that?*
>
> A. Yes.
>
> Q. And that was at the school or the guard house?
>
> A. I think it was the school and the guard house.
>
> Q. And the guard house?
>
> A. Yes. I am not sure.
>
> Q. You are not sure?
>
> A. No, sir. [Emphasis in original.]

[651] The Crown sought to counter Oates' evidence with reply evidence from two witnesses. First, the Crown called in reply Marjorie Gardner, a shorthand reporter, who testified that she recorded in narrative form Inspector Graham's interview with Doug Oates on June 13 in the Guard House in which he reportedly said that it was "a half hour

either way from 7 o'clock" when he saw the appellant and Lynne cross the bridge. Ms. Gardner confirmed that the typewritten statement conformed to her shorthand notes.[36]

[652] Second, the Crown called Paul Desjardine, a Grade 9 student (age fourteen), who had testified that on the evening of June 9, he and Gary Sutton rode to the bridge to go fishing. In reply, Desjardine said that he left home at about 6:10 or 6:15 p.m. and reached the bridge at about 6:25 p.m. Upon their arrival at the bridge, which would have been at about 6:25 p.m., Desjardine claimed that he and Sutton fished from the bridge for about fifteen minutes. While doing so, he noticed Doug Oates and Karen Daum collecting turtles. According to Desjardine, Oates and Daum left the bridge at about 6:30 p.m. and started back towards the Station on their bicycles.

[653] Defence counsel vigorously cross-examined Desjardine and seriously challenged the accuracy of his recollection of the events of the evening of June 9. Nonetheless, in his closing remarks to the jury, Crown counsel combined Desjardine's evidence with that of Mrs. Geiger to suggest that Oates had only one opportunity to see the appellant at the bridge that evening, namely, at about 6:30 p.m. when Mrs. Geiger noticed the appellant alone at the bridge. Crown counsel addressed the jury on this point as follows:

> [Mrs. Geiger's evidence] is quite in line with Paul Desjardine. Steven was down there at six-thirty, and that is obviously when Douglas Oates would see him. Paul Desjardine would see him. Mrs. Geiger would see him. Why then the terrific attack [by defence counsel] on Paul Desjardine for giving out it was six-thirty? Was the fact that the boy hardly knew his

[36] Mrs. Gardner testified that her notes read, "…I think half an hour either way from seven." The typed version of Doug Oates' June 13 statement reads, "…I think a half hour either way from 7 o'clock."

> own name after, any indication he didn't tell the truth? Isn't he substantially borne out by Mrs. Geiger?

[654] Those remarks followed on the heels of a scathing attack on Oates, in which Crown counsel treated his evidence with disdain and portrayed him as "a little liar" who had been coached to testify falsely:

> And then we come to … Douglas Oates, and he is put forward by my learned friend as a witness to be considered seriously. He is twelve years old, and he is the young man who allegedly saw Steven and Lynne at the bridge at from seven to seven-thirty. He is the man that made the big issue of denying his statement that it could have been six-thirty. It is very obvious why the fight to hold the line against the six-thirty, because that is when Steven was there and seen by others, alone. You may have noticed Doug Oates in the box. It is hard, I suppose, for you to remember them all, but this one you may remember … I suggest to you, Gentlemen, he was too bright. Too bright, in that he is not to be believed. Now, he is the one that said he didn't have any chance to read his statement. You heard Constable Trumbley say that the boy read it over and said "It is true, but I am not going to sign it." And that he had not said it could be half an hour either way. It is a rather natural way for a boy to put a thing. A rather natural way to record what he probably said. I suggest that he was prepared for a role and told where to hold the line, and that in doing so he made himself out to be a little liar.

**(ii) Impact of the archival material on Oates' testimony**

[655] Desjardine's reply evidence to the effect that Oates and Daum left the bridge riding their bicycles in the direction of the Station at about 6:30 p.m. seemed credible and clearly would have been capable of discrediting Oates' testimony in the eyes of the jury.

[656] Three of Desjardine's friends, Thomas Gillette (age fourteen), Bryan Glover (age fourteen) and Ken Geiger (age eleven), testified at trial. They were not asked, however,

whether they saw Oates and Daum leave the bridge and, if so, when they left. The appellant has produced statements from these three witnesses found in the archives, which indicate that each of the three boys recalled seeing Oates and Daum at the bridge at about 6:45 p.m. The statements do not indicate when Oates and Daum left the bridge. These statements suggest that Desjardine may have been mistaken when he testified that Oates left the bridge by 6:30 p.m.

[657] In his June 13 statement, Gillette told the police that on the evening of June 9:

> [*A*]*t about quarter to seven* Bryan Glover and I went looking for two of our friends down at the bridge. I looked on the west side and saw Paul Desjardine and Gary Sutton fishing … [W]hen I first went down to the river Paul and Gary were on the bank of the river on the left-hand side of the bridge. *I saw Oates there with Karen Daum, when* [sic?] *they had some turtles. I stopped to look at the turtles for a while*. [Emphasis added.]

[658] In his June 14 statement, Glover gave similar information as had Gillette regarding when he saw Oates and Daum at the bridge collecting turtles. His statement indicates that he saw them after 6:40 p.m. (when he said he left home to go to the river) and before 6:55 p.m. (when he said he left the river to return home to retrieve his fishing rod). Glover's June 14 statement also reads: "[a]fter going down by the river and talking to Gary and Paul and coming back they [Oates and Daum] weren't at the bridge then, or I didn't see them again." Unlike Desjardine, Glover did not purport to see Oates and Daum leave the bridge and head towards the Station.

[659] In Geiger's June 15 statement to police, he is recorded as saying that he got to the swimming hole at about 6:45 p.m. He also mentioned seeing Oates and Daum at the bridge and did not mention anything about seeing them leave.

[660] At a hypothetical new trial, the information in the statements of Glover, Gillette and Geiger could be used in at least two ways. First, the witnesses could be questioned about when Oates and Daum left the bridge. Presumably, their answers would be consistent with their statements. Second, the information could be used in cross-examining Desjardine. It is not unreasonable to conclude that at a hypothetical new trial, Desjardine might well modify his evidence as to the time when Oates and Daum left the bridge if confronted with the fact that three of his friends had recollections that differed from his.

[661] We acknowledge that this information would not necessarily enable the defence to prove that Oates and Daum were on the bridge between 7:00 and 7:30 p.m., when Oates claimed to have seen the appellant and Lynne crossing the bridge. However, putting this information to these witnesses might take some of the sting out of Desjardine's evidence, which came in reply at trial and stood uncontradicted. Also, in light of this information suggesting that Oates and Daum were still on the bridge after 6:30 p.m., the Crown would be hard pressed to use Mrs. Geiger's sighting of the appellant on the bridge at 6:30 p.m. as confirmatory of Desjardine's evidence that Oates and Daum had departed from the bridge at that time.

[662] Of potentially greater assistance to the appellant at a hypothetical new trial are the notes found in the archives of what appears to be a statement made by Oates to Inspector Graham, probably on June 12. These notes contain information that counsel for the appellant could use to rehabilitate Oates' testimony and to cast doubt on Desjardine's. The statement in Inspector Graham's handwriting and recorded in short hand reads:

> Douglas Oates, 11.
>
> – Catching turtles –
>
> I think it was Tues. Supper about 5 p.m. Bike - there about 1 ½ hours. *I'm usually home about 8 o'clock school nights*. Lynne was on crossbar – I went alone. Came home alone – Arnold George at bridge. *I left bridge about 10 minutes after Lynne + Steve went north* – Didn't see Lynne or Steve again. Didn't see Lynne get into car. [Emphasis added.]

[663] The content of the statement could assist the appellant in three ways. First, Oates' comment that he "was usually home about 8:00 o'clock school nights" offers some support for the contention that on June 9, a school night, Oates would have left the bridge in time to be home at about 8:00 p.m. This is consistent with his trial testimony that he left the bridge between 7:00 and 7:30 p.m., about ten minutes after seeing the appellant and Lynne. If he left at that time, he would have been home at "about 8:00 p.m."

[664] Second, Oates' statement refers to "Arnold George at bridge". This observation is of great importance in fixing the time of Oates' departure from the bridge. On the Crown's theory, George arrived at the bridge at about 7:20 p.m. On the appellant's theory, George arrived shortly before 7:15 p.m. On either theory, if Oates were at the

bridge when George arrived, he was at the bridge well after 6:30 p.m. and probably after 7:00 p.m.[37] Oates' statement to the effect that, before he left for home George was at the bridge, would answer the Crown's claim that Oates must have seen the appellant, if he saw him at all, about 6:30 p.m.

[665] Third, Oates' comment to the effect that George was on the bridge also supports the appellant's claim that George arrived at the bridge before he and Lynne rode by. This is consistent both with the version of events the appellant gave to the police and with George's first two statements to the police that he was at the river when Lynne and the appellant cycled north and that he saw them cross the bridge.

[666] There is one other piece of archival information that could support the reliability of the defence evidence of Logan and Oates that they saw the appellant cross the bridge with Lynne. We have referred to the three statements given by George that counsel for the appellant discovered in the archives. In the third statement, that is the formal statement given on June 15, George described looking for the appellant on the County Road and going for a swim in the river under the bridge. He went on to say:

> I went swimming after that. I asked the guys, Gordie Logan, Richard Gellatly, Ken Geiger, Gary Geiger, Robb Harrington, Hessy Daum, Darrell Gilks if they had seen Steve. *Some of them said they had seen him. Logan or Gellatly and Ken Geiger, I think, said they had seen Steve with Lynne going down towards No. 8 Highway.* [Emphasis added.]

[37] The Crown has not pointed to any evidence in the record, including the material found in the archives, that would put George at the bridge between 6:30 p.m. and 7:00 p.m.

[667] As discussed above at paras. 559-561, evidence from George to the effect that someone made the above comment could be used at a hypothetical new trial to at least rebut the Crown's contention that the appellant had manufactured the story about taking Lynne across the bridge to the highway and that he had enlisted his friends to lie for him some time after Lynne disappeared. If the Crown's contention on this point were rebutted, the reliability of the evidence of Logan and Oates would be indirectly enhanced because their evidence was consistent with what the appellant had told the police.

**2. Lynne Harper's Mood and the Possibility that She Hitchhiked**

[668] Another facet of the defence evidence that the appellant contends is bolstered by the archival material concerns Lynne's mood on the evening of June 9 and her willingness to hitchhike. Those issues may be summarized as follows.

[669] In his statements to the police, the appellant claimed that Lynne said something about being "mad" at her mother for not letting her go swimming. He also said that she told him she might go see the people in the little white house on the highway. Finally, he told the police that he saw Lynne getting into a car on Highway 8 after hitchhiking. At trial, there was no evidence to support the appellant's claim about Lynne's mood. The Crown elicited evidence from Lynne's parents that they never knew their daughter to hitchhike.

[670] The appellant submits that the archival material paints a very different picture of Lynne's mood and the likelihood that she would have hitchhiked on the evening she disappeared.

**a) Lynne Harper's mood**

[671] The evidence from the Crown witnesses at trial was that Lynne was not upset on the night of her disappearance. Mrs. Harper denied the suggestion put to her by defence counsel that Lynne was annoyed because she was not permitted to go swimming. In the words of Mrs. Harper: "She wasn't annoyed but she was resigned to the fact." Mrs. Nickerson and Mrs. Bohonus, the two women who were conducting the Brownie meeting at the school grounds that evening, both testified that Lynne appeared to be in "normal" spirits.

[672] The appellant points to a couple of witness statements found in the archives that contain information suggesting that Lynne was more unhappy than was portrayed at trial. For example, Yvonne Danburger (age thirteen) gave a statement to the police in which she said that Lynne "did seem unhappy that she couldn't go swimming." We think this kind of information would be of little assistance to the appellant at a hypothetical new trial in attempting to establish Lynne's mood on the evening of June 9 and whether her mood would have prompted her to go down to the highway to hitchhike.

[673] Of more importance, however, is a statement found in the archives that Mrs. Nickerson gave to the police on June 13, 1959. At trial, neither counsel asked Mrs.

Nickerson about any conversation she might have had with Lynne Harper.[38] However, her June 13 statement reads:

> Age 32 years. I am the Brown Owl of the 3rd Clinton Brownie Pack. Lynne Harper was a Girl Guide, we didn't have her as a Brownie. I last saw Lynne the evening of Tuesday, June 9th at the field day right below the A.V.M.C. school. We were getting the younger children off home, and Lynne asked if she could stay, and about 6:40 p.m. *I sat down under a tree and talked with Lynne. She said she didn't want to go home, her mother was cross with her. She told me her mother wouldn't let her go swimming, but she seemed very joking about it.* I must have talked with her about twenty minutes. At about five after seven Lynne walked away, and then a boy came along with red trousers and red shirt on. He had a bike and parked it, and Lynne sat on the side. I didn't know the boy, not by name, but by sight, and now believe it to have been Steven Truscott. They walked away together towards J Block, him pushing the bike. When it came time to feed the girls about 8 o'clock Lynne was not there. [Emphasis added.]

[674] Mrs. Nickerson's statement is equivocal. It portrays Lynne as sufficiently upset that she did not want to go home, but also as "joking about" her mother's refusal to allow her to go swimming. Nevertheless, at a hypothetical new trial, defence counsel could potentially have presented evidence through Mrs. Nickerson, whether orally or through the admission of her statement under the state of mind exception to the hearsay rule, offering some support for the appellant's assertion that Lynne did not want to go home when he met her at the school grounds. The evidence is far from strong, but it would at least put the appellant in a position where it was not simply his word and nothing more to

[38] It is highly unlikely the trial judge would have permitted the Crown or the defence to elicit any testimony from Mrs. Nickerson about a conversation she might have had with Lynne given his rigid attitude towards hearsay.

suggest that Lynne was unhappy and wanted to delay her return home that evening.

**b) Lynne Harper's propensity to hitchhike**

[675] At trial, Mrs. Harper and subsequently Mr. Harper testified in response to questioning by Crown counsel that they did not know their daughter to hitchhike. After the Crown elicited this evidence from Mr. Harper, the trial judge interjected, "you asked that question once before and it is not admissible, you know. It is of no particular importance in this case." The Harpers' evidence on this point was not mentioned in closing arguments or in the trial judge's charge to the jury.

[676] The appellant has produced several police reports that were made at the time of Lynne's disappearance in which her father is reported as saying that she might have hitchhiked to her grandmother's home in Port Stanley, many miles from Clinton. The appellant submits that at a new trial, this material could be used to establish that Mr. Harper believed that Lynne may have hitchhiked the night she disappeared. Assuming the evidence would be ruled admissible at a hypothetical new trial, the best this evidence could do would be to dull somewhat the impact of Mr. Harper's testimony at trial. We tend to agree with the Crown that this information would be seen simply as a distraught father doing his best to come up with any possible explanation for his daughter's disappearance.

[677] Both parties filed new information in various forms regarding the hitchhiking issue. This material includes affidavits from people who lived in the Clinton area in

1959, as well as police interviews with such people. The material is conflicting. The Crown's material, from friends and acquaintances of Lynne Harper, is to the effect that Lynne never hitchhiked. The appellant's material, with the exception of the evidence of Catherine Beaman, described below, is of a more general nature to the effect that all children of a certain age (generally twelve years and older) hitchhiked at that time. In his testimony before us, Mr. Sayeau (formerly Corporal Sayeau who was one of the O.P.P. investigators on this case in 1959) agreed with the suggestion put to him by appellant's counsel that in those days, he saw teenagers hitchhiking in the area including along Highway 8.

[678] Catherine Beaman was the only witness to testify before us about Lynne Harper's propensity to hitchhike. Ms. Beaman was almost the same age as Lynne and they were good friends. She testified that it was common for children of their age to hitchhike in the area. In her words, "[i]t was just a way of life". Ms. Beaman testified that she could recall hitchhiking with Lynne at least fifteen to twenty times. She had a distinct memory of hitchhiking with Lynne into Clinton to exchange a blue bathing suit. Ms. Beaman acknowledged that she could not recall ever hitchhiking alone, but said she "may have".

[679] We agree with the Crown that standing on its own, Ms. Beaman's evidence does little to advance the appellant's claim that Lynne would have hitchhiked by herself at the highway on the evening of her disappearance. It is one thing for a child to hitchhike with a friend or group of friends and quite another for a child to do so on her own. Nonetheless, we conclude that Ms. Beaman's evidence could be used at a hypothetical

new trial to contradict the evidence from Mr. and Mrs. Harper indicating that Lynne never hitchhiked and to lend some credibility to the appellant's suggestion that Lynne did so on June 9.

[680] In the end, we do not think that evidence relating to Lynne's mood or her willingness to hitchhike would be very important at a hypothetical new trial. That said, the material identified above would permit the appellant to put evidence before the jury that could give some credibility to what might otherwise seem a farfetched claim that Lynne hitchhiked a ride on Highway 8 that fateful evening.

**3. Karen Daum**

**(i) The 1959 witness statement of Karen Daum**

[681] Karen Daum was nine years old when Lynne Harper was murdered. She gave a statement to the police on June 14, 1959, which, if true, offered significant support for the appellant's claim that he bicycled north of the bridge with Lynne on the evening of June 9. Karen Daum did not testify at trial or at the first Reference. She did testify before this court in July 2006. Her recent evidence concerning the events of June 9, 1959 is inconsistent with the events described in her 1959 statement and does not offer any assistance to the appellant.

[682] The appellant seeks to admit Daum's June 14, 1959 statement under the principled approach to hearsay. The appellant submits that under the principled approach to hearsay, the statement is necessary and sufficiently reliable to justify its admission for the truth of its contents.

[683] As we explained in Part IV on our approach to remedy, it is not necessary to decide whether Daum's 1959 statement would be admissible as fresh evidence. In the context of our remedial analysis, Daum's statement has value to the appellant even if this court is not prepared to declare definitively that her statement would be admissible under the principled approach to hearsay. It is sufficient at this stage to say that at a hypothetical new trial, the appellant could mount a formidable argument that the statement should be admitted for the truth of its contents. If successful in that argument, the appellant would have the benefit of Daum's 1959 statement admitted for its truth.

[684] After setting out Daum's 1959 statement and her recent testimony, we canvass the arguments that could be made for and against the admissibility of the statement.

**(ii) Daum's 1959 statement and her recent testimony**

[685] Soon after Lynne Harper went missing, Karen Daum told her parents that she had seen the appellant and Lynne riding on a bicycle on the County Road on the night of June 9. Daum's father, a member of the armed forces stationed at the Clinton base, immediately contacted the police. The police interviewed Daum on Sunday June 14, three days after Lynne Harper's body was discovered. Her statement was taken in shorthand and she was then taken by the police to the County Road to point out where the appellant and Lynne had passed her on a bicycle. On June 19, 1959, Daum signed a typewritten version of the statement, most likely in the presence of her father. It appears that the police interviewed Daum at least three times.

[686] There is no direct evidence that the Crown disclosed this statement, or a summary of it, to the appellant's trial counsel, Mr. Donnelly.[39] The statement was disclosed to Mr. Martin on the first Reference and there is also evidence from which it can be reasonably inferred that, after receiving it, Mr. Martin spoke to Daum, who was then fifteen years of age. For reasons that are not evident from the record, Daum did not testify at the first Reference.[40] She did testify before Mr. Kaufman and before this court.

[687] Daum's statement, dated June 14, 1959, reads as follows:

> I am in Grade 3-4 (accelerated) and I am nine years old. I went to the river swimming twice last week. I don't think I can remember the days. I went one day right after school got out at 4 o'clock with my brother Hessie (Rodney, age 11) and we took our bikes. We went to the bridge on the road. Doug Oates came while we were there, and I think Gary Sutton came down and Paul Desjardine. When we first went we were going to fish, but we went to the place to swim and Hessie went swimming and just kept on swimming and I came up to the bridge and met Doug Oates on top of the bridge. Doug and I were staying there awhile and then Doug I think got down to catch one more turtle and couldn't and said "let's go home." I knew Lynne Harper and Steve Truscott. Me and Doug were coming up from the river and going to go home, and I saw Lynne riding on the bar of the Truscott's boys bike [sic]. We were going home and they were coming towards the river. I never seen Steve give any other girls a ride. Lynne and Steve looked happy. Lynne was wearing a white blouse and blue shorts I think. We didn't speak to them or anything. (Karen taken by Const. Trumbley

[39] A note written by Mr. Bowman, Crown counsel on the first Reference, was found in the archives. It appears to be of a conversation that he had with Mr. Hays in August 1966. The note states that Mr. Hays expected Mr. Donnelly to call Karen Daum and he did not recollect why he did not call her.

[40] It is not possible today to determine why Mr. Martin did not call Daum at the first Reference. We tend to think that he probably made the tactical decision to rely on the expert evidence and not risk calling Daum, who, as will be mentioned below, would have seemed a reluctant witness. It is also possible that Daum had conveyed to Mr. Martin that her story would be different from the version of events described in her statement.

> to point out spot on road where she and Doug met Steve and Lynne.) I didn't tell anybody except my mother that I saw Steve and Lynne on the bike. Doug and I left the bridge together. He was riding first and I was behind him on my bike, but he got his pant leg caught and had to stop so I caught up to him and got ahead. (Point of meeting pointed out was just about railway tracks.)

[688] Inspector Graham and Constable Trumbley witnessed Daum sign the statement on June 19, 1959. A postscript of sorts follows their signatures:

> "I think it was 10 minutes after the big boy who had given turtles to Doug Oates that Doug and I left."

[689] Daum's version of the events in her testimony before this court can be summarized as follows. She still remembers being at the bridge with Doug Oates. She vaguely remembers that at some point she and Oates went down under the bridge to catch turtles and then they came back to the top of the bridge. She also recalls a turtle being placed in the carrier on her bicycle. She did not see the appellant or Lynne while she was on the bridge. Daum recalls that she and Oates left the bridge with their bicycles and went to the spot where the railway tracks cross the County Road. They were still looking for turtles. She believes she may have been at the railway tracks for close to an hour and at some point she asked Oates for the time. She cannot now remember what he said, except that it was between 7 and 7:30 p.m.

[690] She and Oates then left the railway tracks and began to ride home. Oates was ahead of her. On the ride, Oates' pant leg got caught and he had to stop. She caught up to him, said she had to get going because it was late, and rode off without him.

[691] Daum remembers that when she was about mid-way between the railway tracks and the tractor trail, she saw "a figure" on a bicycle coming towards her, who turned out to be the appellant and Lynne. She vividly remembers that as they met, the appellant veered towards her, causing her to turn and fall into the ditch. She looked at them for a few seconds and then continued on home. Importantly, she now places the point where she met up with the appellant and Lynne on the County Road as being beside Lawson's Bush, south of the tractor trail. She does not recall seeing them go past the tractor trail.

[692] There are the following important differences between the details provided in Daum's 1959 statement and her present recollection:

- the statement does not mention her looking for turtles at the railway tracks with Oates;

- the statement suggests that she and Oates were together when they saw the appellant and Lynne;

- the statement indicates that she met the appellant and Lynne either when she was coming up from the river with Oates or, according to the parenthetical note, "just about the railway tracks" (both of these locations are north of Lawson's Bush), whereas in her recent testimony she recalls meeting them beside Lawson's Bush;

- the statement does not mention the incident that Daum presently recalls about the appellant having forced her off the road;

- she has no present recollection of seeing Gary Sutton or Paul Desjardine that evening; and,

- she does not remember going swimming at the swimming hole before being on the bridge with Oates.

[693] Daum told the court about the circumstances surrounding the taking of her statement in 1959. She has no recollection of reading over the statement or signing it. She remembers that her father was with her when she was with the police, but does not recall whether he read the statement over. She remembers speaking to Constable Trumbley at least three times, always with her father present.[41] On each occasion, Constable Trumbley took her and her father to the County Road to point out where she had seen the appellant and Lynne. She remembers being terrified and crying when she was speaking to the police. She felt that the officer did not understand her and she may have had difficulty expressing herself. She also felt that the officer was pressing her about the location and that she was not saying what he wanted to hear. As well, she recalls being afraid of her father, who was pressing her to tell the truth.

[41] Constable Trumbley is deceased. His police notes have not been found.

[694] Daum testified that she did not talk to any lawyer for the appellant back in 1959. However, around the time of the first Reference, she believes that Ms. LeBourdais and two men whom she thinks were lawyers came to her home. She was handed her statement, but she wanted to avoid a discussion about the case with them so she simply skimmed it over quickly and said it was correct. She was with them for a very short time.

[695] An important matter emerged during counsel for the appellant's cross-examination of Daum. After being shown some photographs of the County Road, she agreed that because of the terrain of the road, if she were mid-way between the railway tracks and the tractor trail - where she earlier testified she was when she first noticed the appellant and Lynne - it would be impossible to see people on the County Road if they were south of the northern edge of Lawson's Bush. Accordingly, she adjusted her testimony and indicated that she must have been closer to the tractor trail when she first saw the appellant and Lynne coming up the road.

[696] Daum's original 1959 statement, if true, supports the defence case that the appellant rode Lynne to the highway. According to the statement, she met up with the appellant and Lynne either near the bridge or around the railway tracks - both points on the County Road well north of Lawson's Bush. However, Daum's 1959 version of events is inconsistent with the testimony of the defence witness, Doug Oates, to the extent that he said he saw the appellant and Lynne go by when he was standing on the bridge. He also testified that when he saw them pass by, he thought Daum did not see them because she was just coming up the hill from the river.

**(iii) The hearsay analysis: admissibility of the 1959 statement**

[697] Daum's 1959 statement, which the appellant seeks to rely on for its truth, constitutes hearsay evidence. Hearsay evidence consists of out-of-court statements that are offered in judicial proceedings for the truth of their contents. Under the hearsay rule, such evidence is presumed to be inadmissible unless the court is satisfied that an exception to the hearsay rule applies. The central rationale behind the hearsay rule is that counsel cannot test the reliability of hearsay evidence in court by cross-examining the witness.

[698] This is not the occasion for a full review of the hearsay rule and its exceptions. The discussion that follows will centre principally on the unique, if not idiosyncratic hearsay issues raised by the possibility of admitting Daum's 1959 statement for its truth. These issues include the following: the out-of-court statement was made by a child almost fifty years ago; the statement contains information that would have supported the defence case at trial; and the witness now disavows the truth of a salient feature of the information that she provided when her memory of the events would have been much clearer than it is today.

[699] By way of some necessary background, the Supreme Court of Canada in the 1990s began to make significant changes to the hearsay rule, and its exceptions, under the rubric of the principled approach to hearsay. The changes were brought about by a series of decisions beginning with *R. v. Khan* (1990), 59 C.C.C. (3d) 92. The principled approach was further refined in cases such as *R. v. Smith* (1992), 75 C.C.C. (3d) 257, *R. v. B.*

*(K.G.)* (1993), 79 C.C.C. (3d) 257 and *R. v. U. (F.J.).* (1995), 101 C.CC (3d) 97. The Supreme Court's most recent decision is *R. v. Khelawon* (2006), 215 C.C.C. (3d) 161, released in December 2006 while the appellant's case was pending in this court.

[700] As the Supreme Court first explained in *Khan*, the principled approach to the admission of hearsay evidence focuses on two concerns: reliability and necessity. If the statement is sufficiently reliable, and if it is necessary to receive it, then it is open to a court to admit hearsay evidence. The trial judge only determines whether the statement is admissible. If it is admitted, the trier of fact must then determine, considering the statement in the context of the entirety of the evidence, whether or not to rely on it in deciding the issues in the case.

[701] The reason for requiring that hearsay evidence is sufficiently reliable and that it is necessary to receive it is that hearsay evidence presents what are referred to as "hearsay dangers." For example, when the maker of the statement is not in court, it may be impossible to inquire into his or her perception, memory, narration, or sincerity. Other hearsay dangers are that the statement may not have been accurately recorded, or that it may be impossible to detect exaggerations or falsehoods in the statement.

[702] Having regard to the reliability requirement, it is necessary to distinguish between threshold and ultimate reliability. When considering an application to admit hearsay evidence, it is for the trial judge to make a preliminary assessment of the threshold

reliability of the statement. If this threshold is satisfied, the trial judge may admit the statement and the determination of its ultimate worth is left to the jury.

[703] A hearsay statement will satisfy the threshold reliability requirement on two different bases: first, if it is shown that there is no real concern that the statement is trustworthy because of the circumstances in which it came about, and second, if there are adequate substitutes for testing the truth and accuracy of the statement by means other than contemporaneous cross-examination. These two grounds are not water-tight compartments. Rather, as explained by Charron J. in *Khelawon*, at para. 49, "neither of [these two bases for satisfying the reliability requirement] excludes consideration of the other." We understand this to mean that the lack of fully adequate substitutes for testing the reliability of a statement may be compensated in part by the apparent reliability of the statement.

[704] Another aspect of *Khelawon* that informs the analysis of threshold reliability is that the Supreme Court has now rejected the categorical statement in *R. v. Starr* (2000), 147 C.C.C. (3d) 449 at para. 217, that a judge is not to consider the presence of corroborating or conflicting evidence at the admissibility stage when the threshold reliability of a statement is being considered. Rather, as explained at para. 55 of *Khelawon*, "the relevance of any particular factor will depend on the particular dangers arising from the hearsay nature of the statement and the available means, if any, of overcoming them." Accordingly, as noted at para. 93, the judge is required to "adopt a more functional approach … and focus on the particular dangers raised by the hearsay

evidence sought to be introduced and on those attributes or circumstances relied upon by the proponent to overcome those dangers."

[705] In addition to assessing threshold reliability at the admissibility stage, the court must also determine if the necessity criterion is satisfied. Necessity is established in cases where the declarant of the statement is not available to testify in court, for example, where the witness is deceased or is a young child who is not competent to give sworn testimony. Necessity may also be established where a witness is available to testify, but he or she has given a prior statement that is inconsistent with his or her present testimony: see e.g. *R. v. B. (K.G.)*, *supra*, and *R. v. U. (F.J.)*, *supra*.

[706] We mention one final aspect of *Khelawon* that bears on an analysis of the potential admissibility of Daum's 1959 statement at a hypothetical new trial. The court made it clear that their previous decisions in *R. v. B. (K.G.)*, *supra*, and *R. v. U. (F.J.)*, *supra*, have not created categorical hearsay exceptions for prior inconsistent statements. Rather, as Charron J. stated at para. 45, "these cases provide guidance – not fixed categories – on the application of the principled case-by-case approach by identifying the relevant concerns and the factors to be considered in determining admissibility."

[707] We now consider whether the threshold reliability and necessity requirements are capable of being satisfied in the case of Daum's 1959 statement.

[708] In determining threshold reliability, the judge at a hypothetical new trial would have to assess whether the circumstances in which Daum gave her statement provide

sufficient comfort as to its truth and accuracy. In making this assessment, the judge would consider whether the circumstances surrounding the making of the statement could overcome the hearsay dangers referred to above. Furthermore, consistent with the admonition in *Khelawon* that the court can consider both circumstances that go to the reliability of the statement as well as factors that substitute for lack of contemporaneous cross-examination of the declarant while under oath, it would be open to the judge to take into account Daum's present availability for cross-examination. Admittedly, the value of this cross-examination would be muted because of the long passage of time. However, as will be discussed below, the cross-examination of Daum by both parties[42] disclosed important information that could assist in determining the threshold reliability of her statement.

[709] With respect to the hearsay dangers presented by mistaken memory and inaccurate perception, the judge could take into consideration that Karen Daum was first interviewed by police within five days of the events to which she referred. There is no reason to believe that Daum as a typical nine-year-old girl could not accurately perceive and remember the events she described and make the observations she related in the statement. One concern that the judge at a hypothetical new trial might, however, take into account is that during the five days before Daum gave her statement, she would likely have heard talk about Lynne's disappearance and that the appellant had been seen

[42] Both parties had the opportunity to cross-examine Ms. Daum before us.

with her. The judge could consider that, in light of the passage of time, the Crown no longer has any real opportunity to test the impact of those discussions on her memory.

[710] There is some extrinsic evidence that would be helpful in understanding the risk of the potential hearsay dangers of mistaken memory and inaccurate perception. Considering this evidence in assessing threshold reliability is an appropriate application of the *Khelawon* functional approach. There is the evidence of Lynne's clothing on the day she went missing and the manner in which she was riding on the appellant's bicycle. The extrinsic evidence demonstrates that Daum accurately described the clothing Lynne was wearing the night she disappeared, as well as the manner in which she was riding on the appellant's bike. This evidence would thus confirm that Daum was remembering real events. Daum's ability to recall this evidence presupposes an ability to accurately perceive the events.

[711] As for Daum's sincerity, the judge would consider whether Daum had any motive to falsify. The evidence shows that although Daum knew the appellant, she was not a friend of his and she had no motive to falsify her description of the location where she passed him and Lynne on the County Road on account of any relationship with him. There is no basis in the record for suggesting that anyone influenced her in the days before her interviews with police in a way that might have affected her sincerity. To the contrary, Daum testified that she voluntarily told her parents that she had seen the appellant and Lynne on June 9. As soon as her father realized that she might have information relevant to the fate of Lynne Harper, he took her to the police. Neither of the

parties in these proceedings challenged this aspect of Daum's testimony in cross-examination.

[712] Although the statement was not made under oath, the solemnity of the occasion and the need to tell the truth would have been clear to the nine-year-old: she was in the presence of one or more police officers who were investigating the murder of a schoolmate. She testified before us that she understood that her father wanted her to tell the truth. Again, this aspect of her evidence was not challenged by the parties in cross-examination.

[713] The most pressing hearsay danger that the trial judge would need to consider is whether Daum, as a nine-year-old, was able to accurately relate the events to the police and whether her comments were accurately recorded in the statement. Daum testified before us that she was unable to accurately express herself to the police. In other words, while she had an accurate memory of events, she was unable to accurately transmit that memory. However, there are circumstances surrounding the taking of the statement that might lead the trial judge at a hypothetical new trial to conclude that the statement was a reflection of her actual memory and perception of events.

[714] For example, as we have noted, Daum was first interviewed by police in the presence of her father within five days of the events to which she referred. She did not sign the statement until five days later, giving her and her father ample opportunity for reflection and to correct any inaccuracies. It is difficult to imagine that Daum's father,

who she testified was present throughout her encounters with police, would have allowed his daughter to sign a statement that was not an accurate reflection of what she was telling them. The statement was recorded and preserved by police who had a duty to faithfully and accurately record it.

[715] There are other circumstances that suggest the statement accurately reflects Daum's memory of events. Daum was interviewed by the two lead investigators, who had already interrogated and arrested the appellant and who had interviewed many other children, including Philip Burns and Richard Gellatly. By the time of Daum's interview, the police must have had some theory for proving that the appellant killed Lynne Harper. They would have known that Daum's statement regarding where she passed the appellant and Lynne was inconsistent with that theory. Indeed, Mr. Sayeau, formerly Constable Sayeau of the O.P.P., who was closely involved in the investigation of Lynne Harper's murder, testified before our court that he understood and believed the police view at the time to be that Daum "was a cute little girl but she had to be wrong."

[716] Police had no reason to record Daum's recollections in a manner that mistakenly supported the appellant. Crown counsel did not offer a credible explanation for why the police would inaccurately record a statement to favour the boy whom they had arrested for committing the rape and murder of a child.

[717] It is certainly possible that Daum was unable to make herself understood by the police. But this alleged misunderstanding is of startling proportions. If her present

recollection is accurate, the police were unable to understand that she was telling them that she met the appellant about a third of mile south of where they believed she said she was, even though they went to the location at least once and, on Daum's current evidence, three or more times. They were also unable to understand that she vividly remembered the location because the appellant ran her off the road.

[718] Quite simply, her present version of events, including her vivid memory of being run off the road, defies common sense. Daum obviously believes that what she told us is true. But the appearance of honesty is not necessarily a reliable indicator of the accuracy of a memory of events that happened almost fifty years ago.

[719] For these reasons, and despite some concerns expressed above, especially regarding the coercive atmosphere in which Daum gave her statement, we are satisfied that a convincing argument could be made that Daum's 1959 statement meets the test for threshold reliability. At a hypothetical new trial, the appellant could well satisfy a judge that the statement is sufficiently reliable to justify its admissibility.

[720] We now turn to the necessity criterion. The necessity for this statement is two-fold. First, as discussed in *B. (K.G.)*, *supra*, at p. 296, because the declarant has recanted the salient evidence contained in the original statement, it is no longer available other than through an exception to the hearsay rule:

> In the case of prior *inconsistent* statements, it is patent that we cannot expect to get evidence of the same value from the recanting witness or other source: as counsel for the appellant claimed, the recanting witness holds the prior

> statement, and thus the relevant evidence, "hostage". [Emphasis in original.]

[721] Second, this case presents a unique necessity problem because of the long passage of time. Almost fifty years have passed since the statement was taken. Memories have faded. This was tellingly revealed when Daum admitted after being shown photographs of the area that her present memory about where she was on the County Road when she first saw the appellant and Lynne is mistaken. The best possible evidence of what Daum observed almost fifty years ago lies in the statement she made at the time. Without that statement, the information is effectively lost. For these reasons, it seems very likely that at a hypothetical new trial, the appellant would be able to convince the trial judge that the necessity requirement for the admission of Daum's statement is met.

[722] While we are satisfied that Daum's statement could be admitted at a hypothetical new trial on a straightforward application of the principled approach as explained in *Khelawon*, it must be borne in mind that her statement would be evidence adduced by the defence in support of its position. The Supreme Court of Canada has approved of decisions of this court holding that the rules of evidence may be relaxed in favour of the defence "where it is necessary to prevent a miscarriage of justice and where the danger against which an exclusionary rule aims to safeguard does not exist": *R. v. Finta* (1994), 88 C.C.C. (3d) 417 at 527, referring in particular to *R. v. Williams* (1985), 18 C.C.C. (3d) 356 at 378 (Ont. C.A.).

**(iv) The weight to be attached to Daum's 1959 statement**

[723] Having decided that the 1959 statement could well be admitted at a hypothetical new trial raises the next issue. What weight could a reasonable trier of fact give to that statement? We consider the following circumstances to be of assistance in assessing the weight that a jury might give to this evidence at a hypothetical new trial.

[724] First, there is a body of circumstantial evidence that suggests that even up to the 1966 Reference, Daum's recollection exculpated the appellant. Mr. Sayeau testified before us that he understood that Daum's version of events as recorded in the statement did not waver before the trial. According to Daum's present testimony, the police took her on at least three occasions to the County Road to point out the place where she met the appellant and Lynne. If her recollection is correct, and it was not challenged by either party in cross-examination, then this evidence suggests that police were concerned that her version of events was not consistent with the Crown's theory because she must have been pointing to a meeting place north of Lawson's Bush. Daum also testified before us that in 1966, she told people whom she believed to be the lawyers acting for the appellant on the first Reference that her statement was correct. Finally, a note made by Crown counsel acting on the first Reference documents that the trial Crown, Mr. Hays, expected the defence to call Daum. This expectation makes sense only if the Crown believed that her version of events exculpated the appellant.

[725] Second, as we have already noted, Daum's present recollection of events seems unlikely. Her present most vivid memory of her encounter on the County Road with the

appellant and Lynne is of being forced off the road and into the ditch. This seemingly dramatic event, however, is nowhere to be found in the statement. In addition, her testimony before us under cross-examination by Crown counsel regarding where she was when she first saw the appellant and Lynne is demonstrably unreliable given the terrain of the County Road. She could offer no explanation for this mistake.

[726] Third, while Daum's version of events as recorded in the statement is inconsistent in several respects with the evidence of Doug Oates, it is broadly consistent with the defence evidence that the appellant rode with Lynne north of Lawson's Bush to the highway. The Crown is right to point out that the stories told by Daum in her statement and Oates in his testimony cannot be said to be "strikingly similar". Yet, it seems unlikely that Oates, Logan and Daum, who differed from one another in age, gender and school grade, could have conspired or colluded to provide somewhat similar, yet false or unreliable, versions of what happened on the night of June 9, 1959. It is quite possible that either Daum or Oates was mistaken about their precise location when the appellant and Lynne passed by. It is highly unlikely, however, that if they were both either lying or mistaken, they would have independently said that they saw the appellant and Lynne in the same vicinity, well north of the tractor trail leading into Lawson's Bush.

[727] There are parts of the stories told by Daum and Oates that suggest they were together at around the critical time. They both talked about searching for turtles together, they both talked about leaving the area of the bridge together on their bicycles, they both described the appellant and Lynne in similar terms, and they both talked about an

encounter with an older boy, identified by Oates as Ron Demaray, who gave turtles to Oates. Thus, there is every reason to believe that Daum and Oates were near each other shortly before they saw the appellant and Lynne.

[728] At this late date almost fifty years removed, it is not possible to fully reconcile every detail of the versions of events provided by Daum and Oates in 1959. We think, however, that it would be open to a jury to accept the core feature of their stories, which can be reduced to the following: each saw the appellant with Lynne on the County Road north of Lawson's Bush past the tractor trail.

**(v) The value of Daum's 1959 statement**

[729] It is important to bear in mind the context for considering the value of Daum's statement at a hypothetical new trial. The defence heavily relied on the evidence of thirteen-year-old Logan and twelve-year-old Oates. As presented to the jury in 1959, the evidence of each boy suffered from significant potential frailties. Both boys were attacked by the Crown as liars. If Daum's statement were admitted for its truth at a hypothetical new trial, it could significantly bolster the credibility of Logan and Oates, especially when combined with the additional material filed in these proceedings that relates to these boys. The statement would also add a third, independent voice exculpating the appellant.

[730] Regarding Oates' evidence, Daum's 1959 statement could negate the inference the Crown at trial invited the jury to draw concerning Oates' credibility. It was the Crown's

theory that someone had prepared Oates to testify falsely. The relevant excerpt from Mr. Hays' jury address is as follows:

> I suggest to you, Gentlemen, [Doug Oates] was too bright. Too bright, in that he is not to be believed. … *I suggest that he was prepared for a role and told where to hold the line, and in doing* so *he made himself out to be a little liar*. [Emphasis added.]

[731] To bolster the theory that Oates had lied and that he and Daum had left the area well before the appellant and Lynne could possibly have ridden by, Crown counsel noted in his closing that Desjardine and Mrs. Geiger both referred to Oates' and Daum's presence on the bridge at 6:30 p.m. on June 9. In the words of Crown counsel:

> Steven was down there [at the bridge] at six-thirty, and that is obviously when Douglas Oates would see him. Paul Desjardine would see him. Mrs. Geiger would see him. Why then the terrific attack [by defence counsel] on Paul Desjardine for giving out it was six-thirty? Was the fact that the boy hardly knew his own name after, any indication he didn't tell the truth? Isn't he substantially borne out by Mrs. Geiger? *We didn't hear anything from Miss Karen Daum, as to what she would have said.* [Emphasis added.]

[732] If, at a hypothetical new trial, Daum's statement were admitted for its truth and if the jury believed that statement, it would constitute admissible evidence that Daum was with Oates and that she saw the appellant and Lynne on the County Road north of Lawson's Bush. It would also provide evidence that Daum and Oates were at the bridge well after 7:00 p.m., contrary to the evidence of the Crown witness, Paul Desjardine.

[733] Viewed from a different perspective, Daum's 1959 statement could weaken the Crown's case in at least three significant ways:

- her statement undermines the Crown's claim that Oates and Logan were influenced to lie by their association with the appellant and each other. Daum was a different age and gender and had no known connection to the appellant or his friends;

- her statement undermines Desjardine's reply evidence that Daum and Oates left the area of the bridge at around 6:30 p.m.; and

- her statement all but eliminates any basis for the adverse inference that the Crown claimed the jury should draw from her failure to testify at the trial.

**D. THE CRIME SCENE**

[734] One aspect of the record that remains unaffected by the new evidence is the evidence relating to the crime scene. That evidence is essentially the same today as it was some forty-eight years ago when the jury first heard it, and it remains as puzzling today as it was then. We propose to mention three troubling features of this evidence because they form part of the complete record and must accordingly be taken into account in assessing the overall strength of the Crown's case. These features provide more questions than they do answers. Experience shows that loose ends of that nature can, and often do, give rise to a reasonable doubt.

[735] The first puzzling feature of the crime scene arises from the undisputed evidence of Dr. Penistan that Lynne died in Lawson's Bush where she was found and that she was either dead or in the process of dying when she was sexually assaulted. In other words, whoever sexually assaulted her did so after he had strangled her. That series of events may account for the complete absence on her body of the type of external marks of violence, such as bruising, which one would normally expect to find if she had struggled with her assailant, initially to fend off his sexual advances, and then to prevent him from strangling her to death with the sleeve of her blouse.

[736] While far from conclusive, that gruesome picture – no struggle, the use of her blouse as a garrotte and sex while she was dead or dying – seems out of place with the actions of a fourteen-year-old schoolboy whose sexual advances were rebuffed by a twelve-year-old classmate; rather, this picture would appear to be the work of a sexual deviant for whom sex with a dead or dying child was somehow capable of providing stimulation. Common sense suggests that Lynne would have put up a struggle if the appellant were her assailant. It also suggests that sex would have occurred while she was alive and that the mode of strangulation, likely carried out in a fit of frenzy, would have been manual, not ligature, and not with a piece of Lynne's blouse that had to be torn and adapted to a specific use.

[737] The second puzzling feature of the crime scene relates to evidence indicating that Lynne was bare foot when she entered the bush and that she suffered lacerations on her leg consistent with being cut by barbed wire. The Crown has maintained from the

beginning that the appellant lured Lynne into Lawson's Bush on the pretext of finding some new born calves and, once there, he sexually assaulted and murdered her. Hence, on the Crown's theory, Lynne should have entered the bush voluntarily.

[738] That being so, we can think of no reason why Lynne would have removed her shoes and socks before entering the woods. The ground in Lawson's Bush was not at all conducive to walking bare foot. As is apparent from photographs of the scene, it was completely covered with broken branches, twigs, roots, foliage, stones and mud. Moreover, entry into the woods from either the tractor trail or the County Road was impeded by a barbed wire fence that had to be traversed.

[739] Despite these obvious impediments to going bare foot into Lawson's Bush, there is compelling evidence from the autopsy that suggests that Lynne did not have her shoes and socks on when she entered the woods. This evidence includes a discontinuous series of lacerations extending down Lynne's left leg over the front of her thigh, knee cap, above the ankle and over the dorsum of her left foot (the dorsum is the side of the foot opposite the sole).

[740] Those lacerations can be observed in several photographs filed by Mr. Martin on the 1966 Reference. They were also referred to by Dr. Penistan in his autopsy report and in his "agonizing reappraisal". In the latter document, he noted that because these cuts had bled, he concluded that they were sustained while Lynne was still alive. He also

suggested, based on their appearance, that they were "likely…sustained when Lynne climbed through the barbed wire fence skirting the wood."

[741] Finally, a large deposit of mud was observed on the dorsum of Lynne's right foot. The mud is readily observable in the autopsy photographs and was described by Dr. Penistan in his autopsy report. Significantly, however, the soles of Lynne's feet bore no signs of injury and were clean.

[742] Returning to the discontinuous series of lacerations, the cut on the dorsum of Lynne's left foot could only have occurred while she was not wearing her leather shoes[43] or her socks.[44] This is because both blood and tearing would have been apparent on her socks if Lynne had been wearing them when she sustained this cut. However, no blood was found on the socks when they were submitted to Elgin Brown of the Attorney General's Laboratory for analysis. It is also clear from Mr. Brown's description of the socks in his July 1959 lab report and in his trial testimony that the socks were not torn. Mr. Brown testified that both socks were "neatly rolled" and he agreed with defence counsel that the socks appeared to have been removed with care.

[743] The various injuries to Lynne's left leg and foot and the mud on the top of her right foot suggest that Lynne did not enter the woods voluntarily, as the Crown would have it, but rather, as the appellant contends, that she was dragged in a downward facing

[43] Lynne's shoes are visible in the photographs of the scene lying near where her body was found.
[44] Her socks were also found near the body. The shoes and socks may have been dropped there after she was strangled and raped.

posture, first over barbed wire fence and then for some distance into the woods before being taken to the place where she was strangled and sexually assaulted.

[744] In oral argument on this Reference, the Crown was questioned about the injuries to Lynne's left leg and foot and asked whether there were some theory, other than the one put forward by the appellant, that might account for these injuries and the manner in which they were sustained. No cogent answer was forthcoming.

[745] That, of course, is not fatal to the Crown's case. It is not incumbent on the Crown to tie up every loose end in this or any other case. As a matter of interest, however, we note that at trial, Mr. Hays for the Crown tried his hand at a theory that might account for the cuts on Lynne's leg. No doubt, he found the cuts disconcerting and felt the need to try to explain them for the jury. He said this in his closing address:

> You can see the old fence [along the north end of Lawson's Bush], Gentlemen, on the assumption it continues the same. The posts are going everyway, and wires down. It would be no effort to put a bicycle through, under or over. And that wouldn't cause alarm to Lynne, possibly, if she were told, as Jocelyne was, now this is kind of a secret mission. Lawson doesn't want us to let anyone know the calves are here. Something of that nature. Then was something said or was something done that caused Lynne alarm? And then did her attacker put his arm around her neck and choke her into unconsciousness, as Doctor Penistan said could have been done without leaving any mark. And when she was then limp on the ground on that south side of the field, was she then dragged on her shorts through the fence, getting some cuts on her knees? And was a stop made some fifty feet in, while she was still unconscious, and her pants pulled off? They were found about there. The body was eighty some feet south of the lane or fence line, and the pants were found some thirty

> feet north of the body. Were they dropped there? Taken off by her attacker, left there and was the body taken on in? The decision to go further. And then her showing signs of revival and then the blouse taken and she strangled where she was found and the button coming off there? Gentlemen, it might all have taken place, struggle and all, where she was found.

[746] With respect, there are at least two glaring flaws in the Crown's theory at trial. First, it presupposes, without a scintilla of supporting evidence, that the appellant knew how to render a person unconscious, without leaving a mark, by means of a choke-hold. Second, it fails to account for the cut on the top of Lynne's left foot and the mud on the top of her right foot. To be consistent with this evidence, on the Crown's theory, the appellant or Lynne would have had to remove Lynne's shoes and socks before the appellant dragged her through the fence. No credible theory has been advanced to explain why the appellant and Lynne would have engaged in such bizarre behaviour.

[747] The third feature of the Crown's theory that remains a mystery is the location where the appellant and Lynne are supposed to have entered the woods. The conundrum results from the fact that one week after the appellant's arrest, Lynne's locket was found on a section of barbed wired fence running in a northerly direction parallel to the County Road, some 280 feet south of the entrance to the tractor trail.

[748] At trial, Mr. Hays suggested to the jury that the appellant must have initially taken Lynne's locket as a souvenir. In the days following her disappearance, when the investigation began to narrow in on him, he returned to the bush "and planted [it], so to speak, where it was found."

[749] On the first Reference, Mr. Bowman for the Crown submitted for the first time that the appellant may well have taken Lynne into the bush through the section of fence where her locket was found. The difficulty with that theory, however, is that with all of the vehicular and pedestrian traffic on the County Road that evening, surely someone would have seen the appellant's distinctive bicycle parked by the side of the road – unless perhaps he dragged it over the barbed wire fence and into the woods to a place where it could not be seen, and then returned to drag Lynne to the site of her death.

[750] It is not our function to solve the crime. It is our function to decide whether the appellant should be acquitted. The body of evidence surrounding the crime scene, including the brutal nature of the crime, the lack of defensive injuries on Lynne Harper's body, the nature of the injuries she did sustain, and the general uncertainty as to the place and manner by which she entered the woods, leaves a series of unanswered questions. In deciding what a jury would likely do at a hypothetical new trial, experience teaches that these are the kinds of questions that are likely to move a jury in the direction of reasonable doubt. To that extent, these features of the crime scene evidence play a part in our ultimate conclusion.

**E. WHAT IS LEFT OF THE CROWN'S CASE?**

[751] We have set out in some considerable detail why, on the totality of the material now available, we are satisfied that an acquittal would clearly be the more likely result if a new trial on the merits could be held. We now indicate why we are not satisfied that an

acquittal would be the only reasonable possibility and why, absent the unusual circumstances of this Reference, the normal remedy would be a new trial.

[752] In normal circumstances, an appellant will be acquitted by an appellate court only if he or she can demonstrate that an acquittal is the only reasonable verdict. The test is a strict one. The court must be satisfied that no jury acting judicially could reasonably convict on the evidence.

[753] As we have explained, the four main pillars of the Crown's case have been materially altered by the evidence adduced on the first Reference and by the fresh evidence and the other material, both new and archival, that is now before this court. Our evaluation of the new material and what impact it might have at a hypothetical new trial is necessarily somewhat speculative. We have limited our consideration to what we regard as realistic possibilities in assessing how the defence position could be strengthened. However, when deciding whether an acquittal would be the only reasonable outcome, we must bear in mind that some of these reasonable possibilities that could advantage the defence may not come to pass and that parts of the Crown's case could remain intact.

[754] Regarding the first pillar of the Crown's case, the time of Lynne Harper's death, it can no longer be said based on the pathology evidence that the appellant had the exclusive opportunity to commit the offence. That said, the remaining pathology evidence does not exclude the appellant's opportunity to commit the offence because it

does not rule out the possibility that Lynne died between 7 and 8 p.m., a time frame during which the appellant was known to be with her. Moreover, if a jury were to find that the pathology evidence shows only that the window of opportunity extended to darkness on June 9, the Crown's contention that the appellant killed Lynne Harper before he returned to the school grounds remains a viable claim.

[755] The entomology evidence potentially excludes the appellant as the killer. However, it suffers from the frailties in the factual premises behind the experts' opinions that we have discussed. It would be open to a jury to reject the factual foundation for the opinions favouring the appellant, in which case all that remains is the pathology evidence concerning the time of death.

[756] With regard to the second pillar of the Crown's case, we have postulated a view of the County Road evidence that is consistent with the appellant's innocence. However, it would be open to a jury to find that the various times upon which that scenario depend are simply too uncertain to be of any assistance in determining the whereabouts of the various children on the evening of June 9.

[757] Furthermore, there is still a body of evidence suggesting that Philip Burns and Richard Gellatly left the area of the bridge at the same time. While that evidence has been called into question, a jury might still find that the two boys left at the same time. We are left to speculate about the impact that the archival material could have on this evidence.

[758] For example, consider the evidence of the Crown's witness Mrs. Dunkin. We have pointed to parts of the archival material that could reasonably cast doubt on her evidence that she saw Burns and Gellatly leave the area of the bridge in tandem on the evening of June 9. At a hypothetical new trial, however, Mrs. Dunkin might provide an adequate explanation for why her first statement to police did not refer to her having seen Burns and Gellatly on the evening of June 9. Moreover, she might confirm her recollection of seeing these boys leaving the area of the bridge at the same time. Her evidence would thus not necessarily be rejected. In such a case, the Crown could contend that that there is no satisfactory explanation for why Gellatly saw the appellant and Lynne while Burns did not, except that they turned off the County Road down the tractor trail leading into Lawson's Bush - the very place where Lynne's body was discovered.

[759] There also remains the trial testimony of Arnold George and Jocelyne Gaudet that they were looking for the appellant at the relevant time. We have suggested that Arnold George was not a credible witness. We have also postulated a theory consistent with innocence for why Gaudet did not see the appellant. But these are pre-eminent jury questions. We are in no position at this juncture to say for certain that George was lying. While there seems no doubt that Gaudet was at least mistaken about her times, a jury could still find that she was in the area at approximately the time that the appellant and Lynne Harper should have been on the County Road. She testified to a reason to be looking for the appellant. That aspect of her evidence was arguably confirmed to some

degree by other evidence indicating that the appellant was seen on his bicycle in the area of Lawson's Bush after 6 p.m. on June 9.

[760] The Crown would also be able to point to the testimony of several other people who were at the river and along the County Road and who testified that they did not see the appellant or Lynne in the critical time frame between 7 and 8 p.m. on June 9 including Mrs. Beatrice Geiger, Bryan Glover, Thomas Gillette, Paul Desjardine, Ken Geiger, Robb Harrington and Teunis Vandendool.

[761] Regarding the third pillar of the Crown's case, there still exists a body of post-offence conduct evidence that the Crown at a hypothetical new trial could rely on in the form of various statements made by the appellant to his classmates and to the police in the period between the evening of June 9 and his arrest. We already reviewed Arnold George's evidence regarding the statements he attributed to the appellant and the relevance of the new information brought forward by the appellant to the credibility of George's evidence at paras. 517 and 548-551. It is sufficient to repeat here that George said that on June 9 at about 8:45 p.m., the appellant indicated that he and Lynne were on the side of Lawson's Bush looking for a cow and a calf. The archival material puts in issue the credibility of all of George's testimony and specifically his evidence concerning this conversation. Again, however, the credibility of his testimony is pre-eminently a jury question.

[762] There are three other conversations with various school boys that the Crown could rely on at a hypothetical new trial. The first of these occurred on the morning of Wednesday, June 10 at the school. According to Thomas Gillette, everyone at school was talking about Lynne Harper's disappearance. Several of the children were asking the appellant questions about Lynne, as he was thought to be the last person to have been with her. Gillette testified that as he and the appellant walked back into school after recess, the appellant remarked that he had heard a calf in the woods "before" and that he thought he heard another one in there, so he went in to investigate. Gillette did not specifically indicate which night the appellant told him he had heard the calf and gone into the bush, but it is a reasonable inference from the context that he was referring to the night Lynne disappeared.

[763] The second conversation that the Crown could point to was among the appellant and several of his friends while they were at the bridge on Wednesday evening, June 10. George, Gillette, Paul Desjardine and Bryan Glover all testified about this conversation. We summarized George's testimony about it above at paras. 520-521. Gillette testified that while the appellant and the other boys were standing on the bridge and George was underneath it, George said that he had seen Lynne Harper go into the bush with the appellant. The appellant asked George to repeat what he said and George repeated the same statement. The appellant then denied that he had gone into the bush with Lynne. Gillette testified that it sounded as if the appellant was threatening George.

[764] Paul Desjardine gave a different version of this conversation. According to Desjardine, he asked the appellant if he had taken Lynne Harper into the woods and he said he did not. Desjardine said that George told him that he had. The appellant asked George if he had told Desjardine that and George denied having done so. Desjardine testified that a few minutes after this exchange, the appellant told him that he had been in the woods, along the north side, looking for a cow and a calf.

[765] Bryan Glover gave a version of the conversation similar to that of Desjardine. He recalled Desjardine asking the appellant if he had gone into the woods with Lynne Harper the previous evening. The appellant denied that he had done so and went on to say that he had gone in there to look for a calf. In cross-examination, Glover agreed that he heard only a part of the conversation.

[766] The third conversation available to the Crown occurred on Thursday, June 11 just after lunch at school. George Archibald (age thirteen) testified that he overheard a conversation between the appellant and Arnold George. According to Archibald's evidence, George asked the appellant what he was doing in the woods with Lynne. The appellant replied, "I wasn't in the woods with Lynne, was I?" George hesitated for a moment and then said, "No, I guess it was somebody else." Archibald testified that the appellant went on to add, "I was chasing a cow, wasn't I, Butch?"

[767] These three conversations provide an evidentiary basis upon which a jury could reasonably find that that the appellant admitted going into Lawson's Bush on Tuesday

evening looking for a cow and a calf. That admission potentially had some limited value to the Crown. First, it provided some support for Gaudet's evidence that she and the appellant had planned to meet that evening and go into Lawson's Bush to look for calves. Second, and more importantly, the appellant's admission that he was in Lawson's Bush could support the contention that the appellant was not being candid with the police in his statements to them before Lynne Harper's body was found.

[768] At a hypothetical new trial, the Crown could also continue to submit that the appellant concocted a story, which he told to the police after Lynne's disappearance, about a car picking her up at the highway in order to divert the search efforts away from the crime scene. It would remain open to the Crown to argue that the appellant could not have discerned, accurately or not, the colour of a licence plate from his vantage point on the bridge some 1300 feet away from the intersection of the County Road and the highway.

[769] Another aspect of the appellant's statements to police that the Crown could rely on at a hypothetical new trial as post-offence conduct is the evidence led at trial of the appellant's response to the question posed by police about whether he had seen any cars on the County Road during his ride with Lynne. The appellant told the police that he had seen an old grey Plymouth or Dodge with a man and a lady in it. He was asked if he could remember the licence number, to which he replied that it was 981 666.

[770] In the course of their investigation, the police tracked down the vehicle with that licence number, however, it was yellow and green in colour and the owner testified at trial that the car was in Toronto on June 9. Police also located four other vehicles with a similar combination of digits in the licence number, but these were registered to owners who did not live in the Clinton area and whose owners testified at trial that their cars were not near Clinton on June 9. A fifth vehicle, bearing licence plate 891 666, belonged to a grey 1949 Chevy sedan owned by a man who lived on the Clinton R.C.A.F. base. This man testified that he was not on the County Road on the evening of June 9.

[771] The Crown could continue to advance the argument made at trial that the appellant had seen the 1949 Chevy sedan in the interval between June 9 and his interview with the police and that he was "getting some ammunition ready" by giving that licence number on the chance that this car was out on the County Road on June 9. He was off by one digit of the licence number, but his description of the car was accurate. However, as Crown counsel put it to the jury at trial, his plan "misfired" because the owner of the vehicle testified that he was not on the County Road that night.

[772] It would also still be open to the Crown to argue that Lynne's parents did not know her to hitchhike and there is no evidence that she would have hitchhiked alone. Accordingly, the Crown could still argue that this aspect of the appellant's story to police does not have the ring of truth.

[773] The fourth pillar of the Crown's case, the penis lesions evidence, was substantially weakened by the evidence led by the defence on the first Reference. As we have said, however, the possibility remains that these lesions were the result of a pre-existing skin condition that was aggravated by an act of intercourse.

[774] In addition to what remains of the four evidentiary pillars of the Crown's case, there is also some physical evidence that the Crown relied on at the trial to connect the appellant to the scene of the killing that the Crown could continue to rely on. For example, tire impressions similar to impressions that could have been made by the appellant's bicycle were found on the tractor trail.[45] In addition, the police seized from the appellant's home a pair of canvass shoes with a similar tread to shoe impressions found two to three inches from Lynne Harper's left heel and likely made by the perpetrator.[46] While not very compelling pieces of evidence, these are pieces of circumstantial evidence that are still available to a jury.

[775] In summary, it would be open to a jury to reject the evidence of the County Road witnesses who testified for the defence and to accept the evidence of the witnesses who testified for the Crown that the appellant and Lynne did not travel on the County Road north of the tractor trail, but must have turned down the tractor trail into Lawson's Bush

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[45] Given the absence of precipitation in the days before Lynne's disappearance, another explanation for those tracks is that they were made about a week before her disappearance, when the appellant and a friend were in the area building a fort. There was also the possibility that the tire tracks could have been made by a different bicycle, as Mr. Donnelly argued in closing.

[46] For technical reasons related to a provision of the *Canada Evidence Act*, the trial judge did not permit the Crown to call an expert in footprint impressions. This evidence was called at the Supreme Court Reference and would be available to a jury at a hypothetical new trial. Detective Sergeant Alsop testified at the first Reference that in his opinion, the footprint was made either by the appellant's right shoe or another shoe with similar characteristics.

where Lynne met her death. It would also be open to a jury to conclude based on the pathology evidence that Lynne Harper died within the period during which she was in the appellant's company. Finally, a jury could conclude based on the post-disappearance statements of the appellant that he was not being honest with the police regarding his movements that evening and that he was attempting to divert police attention away from the scene of the crime, knowing that the body was in Lawson's Bush. In these circumstances, we cannot say that an acquittal is the only reasonable verdict.

## PART VI – CONCLUSION

[776] For the reasons set out above, we are satisfied that the fresh evidence and the new material before this court have significanlty significantly undermined the strength of each of the four factual pillars of the Crown's case. In contrast, much of that material has given added force to the evidentiary foundation of the defence case.

[777] First, on the crucial issue of the time of Lynne Harper's death, the pathology evidence that we have admitted as fresh evidence renders the expert medical evidence heard in the prior judicial proceedings, to the effect that Lynne must have died before 8 p.m. on June 9, scientifically untenable. To the extent that the Crown relied on this evidence at trial and on the first Reference to demonstrate that the appellant had the exclusive opportunity to murder Lynne Harper, that key pillar of the Crown's case is now gone.

[778] The entomology evidence that could well be received at a new trial further undermines the Crown's claim that Lynne Harper died before 8 p.m. While the evidence is subject to certain frailties, if it were admitted and if it were accepted by a jury, it could go so far as to exclude the appellant as the killer and would, at a minimum, cast further doubt on the Crown's claim that Lynne died before 8 p.m.

[779] As for the second pillar of the Crown's case, the County Road evidence, if a new trial were possible, that pillar could be significantly weakened by the archival material. This is particularly true of the "Burns-Gellatly" cornerstone. The archival material suggests that a credible case could be made that Philip Burns and Richard Gellatly did not leave the area of the bridge at the same time and proceed in tandem southbound on the County Road. Instead, the material suggests that Burns left several minutes before Gellatly. This would explain why Gellatly saw the appellant and Lynne and Burns did not. In so doing, it would negate the key element of the Crown's County Road evidence. At the same time, the archival material suggests a credible alternative theory that is consistent with the appellant's position that he left the school after 7:20 p.m. and took Lynne on his bike along the County Road to the highway.

[780] Third, the Crown's post-offence conduct pillar rested principally on the testimony of Arnold George and on photographic evidence suggesting that the appellant could not possibly have seen the details of a car at the highway from his position on the bridge. The archival material is capable of seriously undermining George's credibility to the extent that a jury would be unlikely to act on his evidence standing alone. George's

evidence that the appellant asked him to lie to the police for him, and George's evidence that the appellant said he was near Lawson's Bush with Lynne on the evening of June 9, are unsupported by any other evidence.

[781] The archival and photographic material also indicates that the evidence relied on by the Crown at trial to show that the appellant could not see the details of a vehicle from his vantage point on the bridge was highly misleading. This material provides support for the claim that the appellant could reasonably believe that he saw the colour of the licence plate on the vehicle while standing on the bridge.

[782] The fourth pillar of the Crown's case, the penis lesions evidence that so vividly demonstrated the appellant's guilt at trial, has been weakened to the extent that it is virtually no evidence at all.

[783] In addition to weakening the four main pillars of the Crown's case, the archival and other material is capable of blunting the Crown's attack on the defence evidence and enhancing the reliability of that evidence. For example, evidence impeaching George's credibility would also have the effect of undermining the Crown's claim that Logan, like George, had agreed to lie for the appellant. The photographic material lends additional support to Logan's claim that he could see the appellant on the bridge from where he was standing down in the river.

[784] The credibility of Doug Oates' evidence that he saw the appellant and Lynne pass by him on the bridge is also buttressed by the archival material, notably the statement he

made to the police, probably on June 12, 1959. The content of that statement supports Oates' trial evidence that he was at the bridge after 7 p.m. on June 9 and undermines the Crown's claim that Oates had left the bridge by 6:30 p.m. before the appellant was with Lynne.

[785] Also potentially capable of bolstering the defence case is the statement given to the police by Karen Daum shortly after Lynne's body was found. Like the evidence of Oates and Logan, the content of Daum's 1959 statement provides support for the defence theory that the appellant and Lynne Harper rode past the bridge to the highway. While the statement suffers from certain frailties, it would be open to a judge under the present hearsay rules to admit that evidence. If it were admitted, it would be open to a jury to accept that statement in preference to Daum's present recollection of events. If so, there would be evidence from three witnesses to support the appellant's claim that he crossed the bridge with Lynne and took her to the highway. The Crown theory that the appellant had conspired with his friend, George, and the defence witnesses to fabricate a defence would be virtually untenable.

[786] Finally, then as now, the crime scene continues to raise serious questions about the Crown's theory as to how this crime was committed. While the evidence does not exclude the possibility that the appellant was the killer, aspects of the scene of Lynne's death seem inconsistent with the theory that the appellant was the perpetrator.

[787] For these reasons, dealt with in considerably more detail above, we have concluded that, while it cannot be said that no jury acting judicially could reasonably

convict, we are satisfied that if a new trial were possible, an acquittal would clearly be the more likely result. Having regard to the highly unusual circumstances of this Reference, we have determined that the most appropriate remedy is to enter an acquittal. Accordingly, in the words of s. 696.3(3)(ii) of the *Criminal Code*, the appeal is allowed, the conviction for murder is set aside and an acquittal entered.

[788] We wish to thank all counsel for their assistance in this unique and difficult case. We have already referred to the determination of Mr. Truscott's counsel, who diligently pursued every possible avenue and presented their case with candour and great skill. Likewise, Crown counsel were extremely thorough and, as one would expect, candid and helpful in their presentation of the Crown's case.

RELEASED: August 28, 2007 ("RRM")

"R. Roy McMurtry C.J.O."
"Doherty J.A."
"Karen M. Weiler J.A."
"M. Rosenberg J.A."
"M. J. Moldaver J.A."

# APPENDICES