SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Leggette,* 2015 NSSC 112

Date: 20150415
Docket: CRH No. 430128
Registry: Halifax

Between:

Her Majesty the Queen

v.

Blake William David Leggette and
Victoria Lea Henneberry

DECISION ON ADMISSIBILITY

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	January 19 & 20, February 25, 2015, in Halifax, Nova Scotia
Written Decision:	April 15, 2015
Counsel:	Christine Driscoll and Sean McCarroll, for the Crown Terrence G. Sheppard, for the Defendant Blake William David Leggette J. Patrick Atherton and David Dalrymple, for the Defendant, Victoria Lea Henneberry

By the Court:

Overview

[1] In February 2014, Blake Leggette ("Leggette") and Victoria Henneberry ("Henneberry") were arrested in Ontario for the murder of Loretta Saunders. They were brought back to Nova Scotia and Leggette was remanded in custody at the Central Nova Scotia Correctional Facility located in Burnside, Nova Scotia ("Burnside Jail").

[2] Leggette is 26 years old. His education is limited to completion of grade nine. Leggette has no criminal record and prior to being remanded on these charges, he had never been in a prison. Leggette was a very inexperienced inmate. Leggette has a fascination with the Hells Angels Motorcycle Club.

[3] According to the evidence on this *voir dire*, Darcy Kory ("Kory") is a 47-year-old experienced inmate, who has spent approximately 17 years in prison. Within a day or so of his arrival at the Burnside Jail, Kory made arrangements with Leggette to become cellmates. Leggette was then housed in the Burnside Jail with Kory. Kory told Leggette that he had some sort of affiliation with the Hells Angels. Kory attempted to be a mentor for Leggette during their time together as cellmates, not for altruistic reasons but with a strong ulterior motive. Kory is writing a book about his prison experiences and wanted Leggette to provide details about his life and crimes for a chapter in the book.

[4] On April 8, 2014, the prison guards at the Burnside Jail were conducting a general search for a broken mop handle which could be converted to a weapon, known in prison terms as a "shank". During the course of their search, the guards discovered 35 pages of writings in the cell that housed Leggette and Kory. Part of these writings appear to be a complete confession by Leggette to his involvement in the murder of Loretta Saunders. Another part of these writings describes a plan by Leggette to entirely blame Henneberry for the murder. Leggette testified on this *voir dire* that the writings were prepared for a lawyer, not for Kory's book.

[5] Unbeknownst to Leggette, just prior to his own testimony on this *voir dire*, Kory returned to Nova Scotia from British Columbia where he had been in prison. Kory provided a statement to the Halifax Regional Police after Leggette testified and also provided the police with further writings attributed to Leggette. Kory

then testified on this *voir dire* and told the Court that writings prepared by Leggette were for Kory's book, not for a lawyer.

[6] The defence argues that the writings seized from Leggette's cell on April 8, 2015, were seized improperly, contrary to his right to be free from unreasonable search and seizure pursuant to s. 8 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). The defence also argues that Leggette's s. 7 *Charter* right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice, and his s. 11(d) *Charter* right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal have been violated, as the seizure of the writings allegedly interferes with his right to silence and his ability to make full answer and defence. The defence argues that the seized writings should be excluded from evidence in accordance with s. 24(2) *Charter*.

[7] The defence also argues that the seized writings are protected by solicitor-client privilege and that as such they are inadmissible.

[8] The Crown argues that these writings were part of a book deal agreed to between Leggette and Kory. The Crown says the writings were never intended for a lawyer and as a result there is no privilege. Additionally, the Crown argues that the search was lawfully conducted in accordance with a governing statute and also argues that there is a reduced expectation of privacy in a prison setting.

[9] For the reasons that follow, I have determined the defence application fails and the 35 pages of writings can be admitted into evidence.

The Legislation

[10] The relevant *Charter* sections include:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **8.** Everyone has the right to be secure against unreasonable search or seizure.
>
> **11.** Any person charged with an offence has the right
>
> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
>
> **24.** (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms

> guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[11] Sections 56, 61, 62 and 65 of the *Correctional Services Act*, S.N.S. 2005, c. 37, state:

> 56 Subject to the regulations and except for privileged correspondence between an offender and the offender's lawyer, the superintendent may inspect all correspondence coming into or going out of a correctional facility, including parcels, written material and material stored by electronic or magnetic media.
>
> 61 (1) Subject to subsection (3), an authorized employee may, in accordance with subsection (2), without individualized suspicion, conduct routine searches in the prescribed circumstances, which circumstances must be limited to what is reasonably required for safety and security purposes.
>
> (2) The searches may be of
>
> (a) any person in or on a correctional facility or that person's property;
>
> (b) a correctional facility or any property of or on a correctional facility, including vehicles in or on a correctional facility.
>
> (3) Where the search referred to in subsection (1) is a strip search, the circumstances referred to in subsection (1) must be limited to situations in which the person has been in a place where there was likelihood of access to contraband that is capable of being hidden on the body.
>
> 62 Where an authorized employee suspects, on reasonable grounds, that a person or property referred to in subsection 61(2) is carrying or contains, as the case may be, contraband or evidence relating to the commission of an offence or the contravention of a rule, the authorized employee may conduct a search.
>
> 65 An authorized employee may, during a search, seize an object or substance if the employee believes, on reasonable grounds, that the object or substance is
>
> (a) contraband; or
>
> (b) evidence relating to
>
> (i) the commission of an offence, or
>
> (ii) the contravention of a rule.

[12] Section 61 and 65 of the *Correctional Service Regulations*, (made under Section 94 of the *Correctional Services Act*) state:

> **61 (1)** Subject to subsections (2) and (3), in addition to the exemption for privileged correspondence with their lawyer in Section 56 of the Act, an offender's correspondence with any of the following persons is exempted from the superintendent's power to inspect offenders' correspondence:
>
> (a) a member of the Legislative Assembly of Nova Scotia;
>
> (b) a member of the Parliament of Canada;
>
> (c) the Deputy Minister of the Department of Justice or the Executive Director or a director of the Correctional Services Division;
>
> (d) a representative of the Office of the Ombudsman;
>
> (e) a representative of the Human Rights Commission;
>
> (f) an inspector designated under the Act.
>
> **(2)** If written material from an offender purports to be addressed to a person or office referred to in Section 56 of the Act or subsection (1) but is incorrectly addressed, the superintendent may bring the error to the offender's attention and, if the offender does not agree to the correction of the address, the superintendent may open and inspect the material in the offender's presence.
>
> **(3)** If a superintendent reasonably believes that written material purportedly sent to an offender by a person or office referred to in Section 56 of the Act or subsection (1) is not from that person or office, the superintendent may withhold delivery of the material until satisfied of its authenticity.
>
> **65** All searches must be conducted in accordance with policies and procedures and approved training established by the Executive Director

Evidence on the *Voir Dire*

[13] Evidence was heard on this blended *voir dire* in two distinct parts. Initially, on January 19 and 20, 2015, the Crown called the three correctional services officers who were involved in the search of Leggette and Kory's cell at the Burnside Jail. These corrections officers were also involved in the seizure of the 35 pages of writings seized from Leggette's cell on April 8, 2014. The seized writings were introduced as exhibit VD-1 on the *voir dire*. Leggette then testified on his own behalf. A torn label was introduced as exhibit VD-2. This torn label was produced by Leggette shortly before a *voir dire* relating to the admissibility of the 35 pages of writings held during the Preliminary Inquiry in the Nova Scotia Provincial Court.

[14] The current *voir dire* continued on February 25, 2015, at which time Kory testified. Through Kory the Crown introduced exhibit VD-5 which is alleged to be writings prepared by Leggette for Kory to become part of Kory's book. As well, exhibit VD-6 was introduced, consisting of more handwritten notes prepared by Leggette, including an "apology" letter written to the family of Loretta Saunders, a *Central Nova Scotia Correctional Facility Offender Request Form* and several handwritten journal entries. Exhibit VD-7 consists of eight pages of Kory's handwritten notes.

[15] The defence called no further witnesses in reply to Kory's testimony.

[16] The *viva voce* evidence heard on the *voir dire* can be summarized as follows:

Correctional Officer Jillian Lucas ("Lucas")

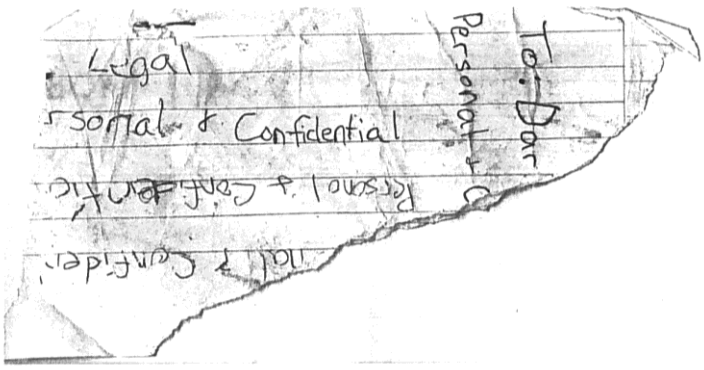
[17] Lucas testified that she had six weeks of training prior to becoming a correctional officer and at the time of this search she had approximately one year of on the job experience.

[18] Lucas advised that on April 8, 2014, she was told at the commencement of her shift that a utility officer noticed that four to six inches of a mop handle had been broken off a mop used in the cell areas and was missing. The mop had been in the West Unit when part was broken off, but staff were not able to identify from which dayroom it came. This was considered a security issue since a mop handle can be fashioned into a weapon, referred to in prison parlance as a "shank". Therefore, a response team was put together, advised what was missing and at least 10 correctional officers were organized to search the 16 cells in the West Unit for the missing four to six inches of mop handle. This was considered a general or routine search of the West Unit as corrections officials had no specific indication as to who might actually have the shank.

[19] Lucas described a cell search as consisting of a search of the cell's shelving units and small bookcase, flipping beds to search the bedding and going through the inmates' clothing. During this particular search, at approximately 15:30 hours, Lucas was tasked, along with Officer Chad Symonds ("Symonds"), to search eight cells. Lucas and Symonds searched other cells and eventually came to West Seven, Cell #5 which housed Leggette and Kory. Leggette and Kory were in a dayroom, not in their cell, during the search.

[20] During the course of searching the shelving units, Lucas came across a cylindrical object described as two brown toilet paper rolls stuck together with a white label on the exterior. Inside the tube were the 35 pages of writings now marked as VD-1. According to Lucas there was a white label on the outside that said "To: Darcy Kory Personal and Confidential". On one of the toilet paper tubes was another handwritten message that said "To: Darcy Kory Personal and Confidential". A larger piece of brown paper was rolled up inside the two toilet paper rolls that merely had artistic drawings on it but no writings. Lucas says that she peeled the white label off, took the tubes apart, put everything on the desk, and fanned through the 35 pages. During her testimony, Lucas examined VD-1, indicated that she could recognize the writings, and reconstructed the cylindrical container.

[21] VD-2 is alleged by Leggette to be the white exterior label. Lucas said that after opening the tubes she may have discarded a white exterior label in Leggette's cell and left it on his desk. VD-2 was produced by Leggette's lawyer shortly before the Preliminary Inquiry during which a *voir dire* was also held to determine the admissibility of VD-1 on the basis of alleged solicitor/client privilege. VD-2 is reproduced below:



[22] After refreshing her memory through the use of her handwritten notes, Lucas initially said that the white label only had written on it: "To: Darcy Kory Private and Confidential". When Lucas was asked if VD-2 was the same white label she saw attached to the toilet paper tubes, Lucas first said she could not recall. Lucas also said she does not recall the white label having the word "legal" written on it. After referring to her notes, Lucas agreed it was "possible" that the white label said

"legal", but she did not recall that being the case. There is nothing in her notes that confirms the word "Legal" was on the label. There is nothing in the subsequently prepared Incident Report that says "Legal", was on the label. In the Incident Report, Lucas also says the label read "Private and Confidential: To Darcy Kory". The word "legal" is therefore not part of the description of the label in any of Lucas' notes, reports or in her *viva voce* evidence. In any event, whether the word "legal" was or was not written on the white label would certainly not carry the day regarding the issue of solicitor-client privilege.

[23] Merely by picking up the cylinder, Lucas would not have known if there was a weapon inside. Therefore, she had to open up the tube to effect the search. Once opened, Lucas could see there was no broom handle inside. Instead, Lucas saw paper inside the tube so she removed the writings and fanned through the pages to make sure there was no hidden contraband.

[24] Lucas testified that she told her supervisor, Captain Jason Iutzi ("Iutzi"), that while fanning through VD-1 the word "weapon" caught her eye. Lucas confirmed that she did not have anything in her notes or incident report about finding the word "weapon" and agreed that finding the word "weapon" in an inmates' writings would normally be significant enough to mention in her notes and Incident Report. Lucas reviewed VD-1 in court and agreed that the word "weapon" is not actually found in the writings. It must be kept in mind, however, that Lucas was an inexperienced guard conducting a routine cell search for a mop handle that could be converted to a "weapon" or a "shank". At p. 14 of VD-1, Leggette writes:

> …and that the two inmates in cell 15 were making a **shank** for him, with a piece of metal they got off of the shower brush. Well Darcy told me instead of the trouble coming to me… [*emphasis added*]

[25] The word "shank" is therefore contained in VD-1. The word "shank" could have caught the eye of Lucas as she fanned through VD-1 during the course of a search for a weapon or a shank. During the intervening time between the search on April 8, 2014, and her testimony in January 2015, Lucas could easily have confused the word "weapon" for the word "shank" in the circumstances of this case.

[26] Lucas was aware of the provisions of the *Correctional Services Act* and believed prison officials can conduct a routine search when they have reasonable grounds to believe any contraband, like a weapon or shank, is involved. Lucas testified that she believes when doing a routine search, guards cannot read legal

mail or legal documents. However, Lucas testified that she believes even if an inmates' writings have the word "legal" written on them, guards can search the mail if it is not on legal letterhead. Lucas testified that guards can scan through personal and confidential writings even during a routine search.

[27] Iutzi was by the dayroom doors when Lucas located the cylinder and once she had fanned through the pages and noticed the offending word ("weapon" or "shank") Lucas asked Iutzi to come into the cell. Iutzi arrived at the cell within five seconds of being called by Lucas. Lucas put the tubes back together, placed the paper inside and handed the cylinder over to Iutzi. Lucas had no other involvement with the cylindrical tube. The search for the broken mop handle continued throughout the West Unit.

Correctional Officer Chad Symonds ("Symonds")

[28] Symonds had been working at the Burnside Jail for less than a year when the search was conducted on April 8, 2014. He was tasked with Lucas to search Leggette and Kory's cell at 15:50. Symonds testified that a cell search could last anywhere between five and twenty minutes. Symonds confirmed he had no special knowledge that the mop handle could be in Leggette's cell. The search was conducted for general safety and security purposes.

[29] Symonds said Lucas searched the shelves while he searched the beds and Lucas found the brown tube. Symonds testified that he believed Lucas left the brown cylindrical tube closed during the search because when Lucas handed the tube to Iutzi it was closed. While not in accord with Lucas's testimony, this actually supports her evidence insofar as she said that she opened the tube and quickly fanned the pages when the word "weapon" (or shank?) caught her eye. Lucas said she then put the papers right back in the tube before handing them to Iutzi. Everything occurred quickly and Lucas did not undertake a protracted review of VD-1 during the cell search. Symonds never handled the tube or the writings and was not present when Iutzi examined it.

[30] Symonds testified that he believes guards are generally not supposed to go through inmates' disclosure. He said that if they have to look through disclosure they must do so in front of the inmate and cannot read it. Symonds said that, in his experience, disclosure is usually found in an envelope with "Disclosure" written on it. He also added that he does not believe that guards can search through inmates private writings during a general search.

Correctional Officer Jason Iutzi ("Iutzi")

[31] Iutzi started working in corrections in 2009. He is currently the Assistant Deputy Superintendent at the Northeast Nova Scotia Institution. On April 8, 2014, he was working at the Burnside Jail as an Acting Captain.

[32] When Iutzi came on shift at 6:45 a.m. on April 8, 2014, he was advised six inches were missing off the top of a mop handle. This was of concern because a mop handle can be converted into a weapon or shank. The West Unit was then locked down for safety of the inmates and officers.

[33] Iutzi testified that s. 61 of the *Correctional Services Act* ("the *Act*") gives prison officials the authority to conduct a general search. Iutzi said that, in his opinion, under s. 62 of the *Act* corrections officials can search for contraband, for items or information that impacts on the safety of the facility and for evidence related to crimes outside of the facility.

[34] Iutzi was overseeing the officers conducting the search in the West Unit. At 15:50, Lucas called him over to Leggette and Kory's cell. Lucas then presented to Iutzi what initially appeared to be six inches of the mop handle. It turned out to be two brown toilet paper rolls stuck together and inside were rolled up papers. On the outside of the toilet paper tubes was written "To: Darcy Kory, Personal and Confidential".

[35] Iutzi testified that Lucas told him there were a couple of keywords that caught her attention in the writings, either "weapon" or "shank", so Iutzi took the package to his office for review. There is no mention in Iutzi's notes about Lucas mentioning anything to him about the words "weapon" or "shank". His notes say he was asked to come down to West 7, Cell 5, because corrections officers had located a brown cylindrical object that could be a weapon. Iutzi prepared an Incident Report that same day and again there is no mention of Lucas telling him about the words "weapon" or "shank" in that report. The Incident Report says Lucas called Iutzi to look at the brown cylinder that could be a weapon. The brown cylinder was the same approximate size and weight as the weapon for which they were looking.

[36] Iutzi confirmed that when the word "weapon" or "shank" was mentioned to him by Lucas, he felt obligated to review the writings for safety purposes. The writings also appeared to Iutzi to contain details of Leggette's involvement in the murder of Loretta Saunders. Once back at his office, he asked for another witness

to observe his opening of the tube. Captain Miller, a senior employee at the Burnside Jail, then witnessed Iutzi open the tubes. According to Iutzi, the tube did not contain the broken mop handle or shank. Iutzi scanned the documents looking for the keywords mentioned by Lucas. During that process, he came across information related to the safety of Leggette and other inmates in the institution as well as offences committed outside the institution.

[37] In accordance with Iutzi's understanding of s. 65 of the *Act*, he then contacted senior management in Corrections, who contacted the Halifax Regional Police Major Crime Section. The writings were turned over to the police as Iutzi felt they contained evidence relating to a crime committed outside the institution.

[38] According to Iutzi this started off as a routine search of the cells; there was no specific indication that Leggette or Kory had the potential weapon; s. 62 of the *Act* authorizes a correctional officer to search an offender's cell; the guards can look in disclosure, but they cannot read it; Iutzi believes that disclosure should be on legal letterhead; most inmates would have legal letters in a sealed envelope addressed to a lawyer saying something like "personal and confidential" and, if so, the guards would not read it; if the inmate is receiving or sending official legal mail, then the guards do not read it. However, the institution reviews all other mail. Iutzi said that if all mail is not strictly monitored, most offenders would label all documents "legal" and the institution would not be allowed to read anything.

[39] Iutzi also said he is allowed to read personal letters (not to a lawyer), even during a routine search. All mail coming into the institution from non-lawyers is read even if labeled "Private, Personal and Confidential". All incoming mail is searched, even if marked "legal", to prevent the smuggling of contraband, which includes anything not permitted in the institution such as weapons, tobacco and drugs. For institutional security, Iutzi believes that guards are allowed to open packages from law firms, skim the material and hand them to the inmate. Iutzi testified that he believes he is allowed to search disclosure but not read it. He also believes that correspondence including disclosure has to be on a law firm's letterhead and would indicate something like "Law Firm X for Offender Leggette".

[40] Leggette was in the dayroom when the search was being conducted. Iutzi cannot recall whether Leggette told him immediately following the search that he needed those documents back as they were personal and for his lawyer.

Blake Leggette ("Leggette")

[41] Leggette testified on this *voir dire*. He was born April 1, 1988, and at the time of his testimony was 26 years old. He has a grade nine education. Has been at the Burnside Jail on remand since February 25, 2014.

[42] Leggette admits he wrote the 35 pages of notes entered as VD-1. VD-1 is in the same order he wrote it. Leggette says he wrote VD-1 in his cell between the beginning of March 2014 and the time of the search. Leggette had the notes rolled up and concealed within toilet paper rolls. He says he used the inner piece of brown cardboard to block the vent in his cell and then added it to the brown cylinder. The white label was on the exterior of the brown cylinder. Toothpaste was used to seal the two tubes and attach the label. He identified the paper used as a label to keep the tubes together as VD-2. He confirmed that he kept the tubes on the middle shelf of his cell bookshelf.

[43] Leggette testified that the purpose of the notes was to provide details to his future lawyer about his own background; institutional happenings that pertained to him; and details of Loretta Saunders's homicide.

[44] Leggette said that Kory became his cellmate within a week of Leggette's arrival at the Burnside Jail in February 2014. He testified that Kory remained his cellmate until June 5, 2014, when Kory was released.

[45] Leggette confirmed that written on the brown cylinder is "To: Darcy Kory Personal and Confidential". Leggette said he wrote "Personal and Confidential" to show that these writings were only for his eyes and his legal representatives' eyes.

[46] Leggette explained that the writings were addressed "To Darcy", because when he was younger his mother encouraged him to write diaries to express his feelings about his father. He said his mother told him to write to someone who was of significance to him, for instance, when he was young, he said, he had a diary written to Harry Potter.

[47] Leggette confirmed that Kory was helping him to get used to being in jail because he had no prior jail experience. He said Kory was the trusted person to whom he was addressing the writings, but added that the writings were never actually meant for Kory.

[48] Leggette testified that he expected his lawyer would read VD-1 and use the notes however he deemed necessary. He agreed that he started writing the notes around the time Kory became his cellmate. Leggette said that his legal representation was not settled at the time VD-1 was seized: his first lawyer was Lyle Howe; then Terry Sheppard; then John Black, and he said that after Lyle Howe had his own legal problems he spoke with Ian Hutchinson and Brian Bailey. Terry Sheppard is currently his lawyer.

[49] Leggette testified that his own father, who was experienced in criminal legal matters, suggested he write down everything about himself and the charges for his lawyer. He said he did as his father suggested. Leggette said that he wrote detailed information about his past as he was not sure what might help with his defence. Leggette told the Court that he had never dealt with a lawyer for any reason prior to his arrest on these charges.

[50] Leggette said that at the time of the search his next court date was April 9, 2014, and, although he was planning on handing the writings over to his lawyer on that date, he never had a chance because coincidentally VD-1 was seized on April, 8, 2014.

[51] Leggette said that the writings were rambling because he had a lot of things on his mind. He said that sometimes he has to re-write things several times. Leggette added that even when speaking he does not always make sense. Of course, Leggette admitted to having to re-write things several times prior to Kory coming forward and producing VD-5 and VD-6.

[52] Leggette testified that on April 8, 2014, he was aware that a general search was being conducted for a weapon. He eventually noticed Lucas and Symonds in his cell and also saw Iutzi being called in. He saw Iutzi coming out of his cell with a paper bag, but was not sure what it contained. Leggette said that when he returned to his cell he started to clean up the mess and noticed the roll of writings were gone. He said he immediately yelled out the door to Iutzi, claimed the writings were for his lawyer, claimed they were confidential and asked for them to be returned. He was advised by the guards that the writings would not be returned. In process of cleaning up, he said he found the white label now marked as VD-2 on his desk and eventually gave VD-2 to his lawyer.

Darcy Kory ("Kory")

[53] When Leggette testified on the *voir dire*, neither he, nor anyone else, had any idea that Darcy Kory ("Kory") was going to testify in these proceedings. Kory was taken to British Columbia on outstanding charges in June 2014. Upon his release from custody in British Columbia, Kory made his way back to Nova Scotia to deal with a […] matter.

[54] Kory attended at the Halifax Regional Police Station on January 12, 2015, and reported an assault to Cst. Sherry Sampson ("Sampson"). While there, Kory advised Sampson that he had information to provide about Leggette and the Loretta Saunders' homicide. On January 19, 2015, Sampson arranged for Leggette to meet with major crime investigators. On January 21, 2015, Kory gave police a recorded video statement. On February 10, 2015, police members drove Kory to his lawyer's office in Annapolis Royal where he retrieved a number of documents that he had left with lawyer for safekeeping while he was being moved within the prison system. Certain of the retrieved documents, comprising VD-5, were provided to the police on February 10, 2015. Additional writings from the same package of documents retrieved from his lawyer's office were provided to the police by Kory on February 11, 2015; these comprise VD-6. Kory's own notes were put into evidence as VD-7. During his testimony, Kory hinted at the possibility that he helped the police locate Loretta Saunders' body based on information he obtained from Leggette.

Detective Constable Steven Langille ("Langille")

[55] Langille testified on the *voir dire*. Langille is now the lead investigator in the Loretta Saunders homicide. He confirmed that on January 19, 2015, he received a call from Sampson indicating that Kory wanted to provide information about the homicide. Kory mentioned his […]case to the police and they advised him that they could not intercede in that proceeding but would help point him in the right direction. The police called family services and the worker involved in the case told the police that she would not discuss the case with anyone but Kory. She then gave the police her telephone number to have Kory call her directly. That was the total police involvement in assisting Kory with his […] matter.

[56] On January 21, 2015, Langille, along with Det. Cst. Steinberg ("Steinberg"), again met with Kory and took a recorded video statement from him. Kory mentioned that he had more documents written by Leggette that he had turned over

to his own lawyer for safekeeping. Kory offered to turn those documents over to the police. The police advised Kory to retrieve those documents himself.

[57] On February 2, 2015, the police contacted Kory to inquire about the status of the documents. Kory advised that he did not have the means to travel to his lawyer's office to retrieve the documents. On February 9, 2015, the police arranged to pick Kory up and drive him to get the documents. On February 10, 2015, Langille said they picked Kory up. Once in the police vehicle, Kory told them his lawyer's office was in Annapolis Royal. They drove him to his lawyer's office, he went into the office on his own and a short time later returned to the police vehicle with a number of documents. Kory then turned over the documents found in VD-5. He also turned over what he described as his own notes, contained in VD-7. On February 11, 2015, during a meeting with police and the Crown, Kory turned over the documents found in VD-6.

[58] Langille confirmed that Kory had no involvement in locating Loretta Saunders' body but the timing of the discovery may have coincided with Kory's suggestions about discussing this with Leggette. Langille advised that Loretta Saunders's body was located in a hockey bag on a highway in New Brunswick because of three pieces of information: 1) Leggette told an undercover operator where the body was located during his transport from Ontario to Nova Scotia; 2) Henneberry gave the police details regarding the location of the body upon her arrest; 3) a cell phone had been used by Leggette and Henneberry near where the body was hidden, and the police used cellular telephone records and cell phone tower locations to narrow down the search.

Detective Constable Joseph Allison ("Allison")

[59] Allison testified on the *voir dire* and is also involved in the Loretta Saunders homicide investigation. He confirmed that on February 26, 2014, Loretta Saunders's body was located in New Brunswick by various means including information obtained from Leggette and Henneberry.

[60] Allison said that on February 9, 2014, Langille told him they were going to go to Annapolis Royal to pick up documents from a lawyer's office. On February 10, 2014, he and Langille picked Kory up in Halifax and drove him to Annapolis Royal. Kory went into the law office on his own and returned to the police van with a number of documents. Kory then separated some documents out of the pile and gave them to the police. They returned to Halifax, made photocopies of the

documents and dropped Kory back off in Halifax. The next day Kory gave the police more documents.

Darcy Kory's Testimony

[61] Kory testified at this *voir dire*. He told the Court that he is 47 years old and has a lengthy criminal record. In fact, it appears that he has spent approximately 17 years of his life in prison. He befriended Leggette at the Burnside Jail in order to obtain material for a book he is writing about his life in prison. He tried to have the police assist him in his […] case prior to providing them with his statement and the written materials. He admitted that providing testimony on this *voir dire* would make an interesting chapter in the book he is writing. Kory testified about his involvement with Leggette while they were cellmates and stated that Leggette was the author of VD-5 and VD-6.

[62] Kory's testimony must be considered in light of the Honourable Justice Peter Cory's words in *The Inquiry Regarding Thomas Sophonow*, September 2001, where he said at p. 63:

> Jailhouse informants comprise the most deceitful and deceptive group of witnesses known to frequent the courts. The more notorious the case, the greater number of prospective informants. They rush to testify like vultures to rotting flesh or sharks to blood. They are smooth and convincing liars. Whether they seek favours from the authorities, attention or notoriety they are in every instance completely unreliable. It will be seen how frequently they have been a major factor in the conviction of innocent people and how much they tend to corrupt the administration of justice. Usually, their presence as witnesses signals the end of any hope of providing a fair trial.
>
> They must be recognized as a very great danger to our trial system. Steps must be taken to rid the courts of this cancerous corruption of the administration of justice. Perhaps, the greatest danger flows from their ability to testify falsely in a remarkably convincing manner.
>
> …
>
> It is true that Justice Dickson, in *Vetrovec v. The Queen*, 1982 CanLII 20 (SCC), [1982] 1 S.C.R. 811, cautioned against placing witnesses in pigeon holes so that only some classes of witnesses would require warnings regarding their testimony. Nonetheless, jailhouse informants are in a special class with the demonstrated ability to mislead and deceive the most discerning and experienced observers. They have, as a class, established a unique record of consistently giving false testimony. They must be given special attention and their evidence should

> generally be excluded and only be admitted in very rare cases. On those rare occasions that it is admitted, it must be approached with the greatest caution.
>
> It is not unduly difficult for jailhouse informants to obtain information, particularly in high profile cases, which would appear to come only from the perpetrator of the crime. As a result, they appear to be reliable and credible witnesses. This case demonstrates that experienced police officers considered very unreliable informants to be credible and trustworthy. Crown Counsel obviously thought that they were credible witnesses who should be put forward. If experienced police officers and Crown Counsel can be so easily taken in by jailhouse informants, how much more difficult it must be for jurors to resist their blandishments. How difficult, if not impossible, it is for jurors to appreciate the polished and practiced facility with which they deliver false testimony. Jailhouse informants are, indeed, a dangerous group. Their testimony can all too easily destroy any hope of holding a fair trial and severely tarnish the reputation of Canadian justice.
>
> There is always a very natural and healthy tendency to sympathize with the victims of the crime and with their families. There is as well a very real concern for the safety of society. Citizens of Canada have every right to be protected from perpetrators of crimes, particularly of violent crimes. The incarceration of those who commit violent crimes is the only feasible manner of protecting society. However, in the desire to protect society, we cannot compromise the principle of a fair trial. Our criminal justice system is based upon the principle that those accused of crimes are entitled to and will always receive a fair trial.

[63] Justice Cory's observations were complemented by a number of recommendations at p. 69:

> As a general rule, jailhouse informants should be prohibited from testifying.
>
> They might be permitted to testify in a rare case, such as kidnapping, where they have, for example, learned of the whereabouts of the victim. In such a situation, the police procedure adopted should be along the following lines.
>
> Upon learning of the alleged confession made to a jailhouse informant, the police should interview him. The interview should be videotaped or audiotaped from beginning to end. At the outset, the jailhouse informant should be advised of the consequences of untruthful statements and false testimony. The statement would then be taken with as much detail as can be ascertained.
>
> Before it can even be considered, the statement must be reviewed to determine whether this information could have been garnered from media reports of the crime, or from evidence given at the preliminary hearing or from the trial if it is underway or has taken place.
>
> If the police are satisfied that the information could not have been obtained in this way, consideration should then be given to these factors:

> Has the purported statement by the accused to the informant:
>
> a) revealed material that could only be known by one who committed the crime;
>
> b) disclosed evidence that is, in itself, detailed, significant and revealing as to the crime and the manner in which it was committed; and
>
> c) been confirmed by police investigation as correct and accurate.
>
> Even then, in those rare circumstances, such as a kidnapping case, the testimony of the jailhouse informant should only be admitted, provided that the other conditions suggested by Justice Kaufman in his Inquiry have been met. In particular, the Trial Judge will have to determine on a *voir dire* whether the evidence of the jailhouse informant is sufficiently credible to be admitted, based on the criteria suggested by Justice Kaufman.

[64] The Loretta Saunders homicide has received significant media attention. Kory was, and is, gathering material to write a book. Kory was also seeking assistance from the police in his […]matter. Keeping in mind the words of the Honourable Justice Cory, I do not rely on the *viva voce* testimony of Kory at all, with the exception of his introduction of VD-5 and VD-6 on this *voir dire*. VD-5 and VD-6 can be compared with VD-1. Leggette has admitted to authoring VD-1 and has not objected to the admission of VD-5 and VD-6 (or VD-7). Leggette merely argues that I must be careful as to the weight ascribed to VD-5 and VD-6. There are certain internal consistencies between VD-1, VD-5 and VD-6 that provide me the comfort to accept them as evidence on this *voir dire*.

Analysis

Solicitor/Client Privilege

[65] Kory testified and was available for cross-examination by Leggette's counsel, Terrence Sheppard. Leggette had already admitted to authoring VD-1 by the time Kory testified. While I give no weight to Kory's *viva voce* testimony, it is interesting to note that Mr. Sheppard did not challenge Kory on the authenticity of VD-5, VD-6 or VD-7. Nor did Mr. Sheppard challenge Kory on his assertion that VD-5 was given to him by Leggette for his book. Leggette said his own father had told him to prepare VD-1 for his lawyer. Kory asserted that he told Leggette to write notes about his background and crimes for his book. Kory was not challenged as to whether it was Kory, not Leggette's father, who had counselled Leggette to write a journal and details of the Loretta Saunders homicide for a book,

not for a lawyer. Kory was not challenged about the fact that VD-5 and parts of VD-6 were addressed "To Darcy Kory" and were actually given to Darcy Kory. Kory was not challenged on his assertion that Leggette gave him more writings after the cell search of April 8, 2014.

[66] During his own testimony, Leggette never mentioned that he had created another set of writings such as VD-5 and VD-6, and had given them to Kory. Leggette never mentioned creating additional writings after the cell search of April 8, 2014, that were given to Kory. All of Leggette's testimony was focused on convincing this court that he had one set of writings that were only ever intended for his lawyer. Yet documents that appear to be written by Leggette and introduced on this *voir dire* confirm the fact that Leggette gave various sets of his own notes to Kory.

[67] Among the documents included in VD-6, Leggette writes to the jail asking them to give the seized notes to Kory for his lawyer. Yet, there was no *viva voce* testimony supporting the suggestion that when Leggette asked the institution to give Kory VD-1 the purpose was for Kory to ask his own lawyer to take Leggette's case.

[68] While I must be careful insofar as Kory's *viva voce* testimony goes, the contents of VD-1, VD-2, VD-5 and VD-6 in many ways speak for themselves. Here are just a few examples:

"To: Darcy Kory"

[69] Various parts of VD-1, including the brown cylindrical tubes that housed the seized writings, were labeled: "To Darcy Kory". VD-2, the white label presented by Leggette after the cell search, was labeled in part "To Darc". The 35 pages of writings found in VD-1 seized from Leggette and Kory's cell had written on them by Leggette in six separate locations "To: Darcy Kory". VD-5 starts "Dear Darcy" and on seven separate pages is written "To: Darcy Kory From: Blake Leggette". VD-6 includes a two-page letter written to the family of Loretta Saunders and at the bottom of the second page is written "To: Darcy Kory To be hand delivered on June 13, 2014". VD-6 also includes a *Central Nova Scotia Correctional Facility Offender Request Form* dated April 10, 2014, asking that the writings found in VD-1 be released to Darcy Kory with the instructions: "*so the package can be delivered to his lawyer, as per my intentions were meant for the writings*". Why not ask for the writings to be sent to a named lawyer? Kory was going to give the

book draft to his lawyer for safekeeping, not to provide a legal opinion to Leggette. VD-6 also includes a multi-page entry dated April 8, 2014, that has "To Darcy Kory" written on top of page one, page two, page three and on the back of page three.

Leggette's Background

[70] VD-1 contains numerous and detailed references about Leggette's background. The information certainly is much more akin to what might be contained in an autobiography or biography rather than instructions to a lawyer relating to a murder charge. For example (and these are just a couple of examples from many similar entries in VD-1):

> "My Introduction"
>
> My name is Blake William David Leggette. Born April 1 1988, in Halifax, N.S. I believe myself to be a kind, respectful person, with a heart of gold. To know and understand who I am, or why I am me, I must start at the beggining with my earliest memory.
>
> At the age of 2 years old, I was taken away from my mother, and placed in a foster home, for a period of time, of which I am unsure of. I remember they were an older couple, who did not sleep in the same bed. They had a nice cabin type house, with a nice pool. He drove a dump truck, (which I remember many excursions,). The sad memory is being touched in a sexual manner, by this man. It is a very vague memory, and also clouded. The next thing I remember is living with my mother again, in Quebec, in school being able to sing the national anthem in French. For some reason, that is the only memory I hold of that province.
>
> The next is New Brunswick, and this is where memories become more memorable and visible in my mind. My mother's best friend, Mary, loved horse's and german shephards. She had 6 horses, one in particular named Murphy, white in color with dirty grey looking splotche's, the first horse I was ever on. She had 8 german shephards, who she would breed and use the puppies as income. She also had 2 daughters, one in particular Jade, whom I had a crush on till at least the age of 12, which is the point in which I lost contact with those people. Now some time later I learn't that Jade's father, was also my step-brothers father. His name is Laurie Jewett, a mean ignorant drugie, alcholic piece of shit. Who was the first person to abuse me. He had a rolled up tv guid wrapped in electrical tape, which he would use to beat our rottwieler Dillon. I remember in the house thier was a room I was not allowed in, that I curiously went into one day, and at the age of 3-4 years old was beat on my back black and blue.

[71] And again later in VD-1 there appears to be another draft of Leggette's "Introduction":

> To: Darcy Kory
>
> My Introduction March 7, 2014
>
> My name is Blake William, David Leggette, I was born on April 1, 1988 in Halifax N.S. From the time I was born till the age of six, I was fatherless. I was in a foster home, had multiple different men in my life that were involved with my mother the came and went, without a thought of me. One man in particular fathered my step-brother, and was the first man to abuse me. I believe I was 4. There was a room in the house that I was not allowed in, well being curious and wanting something one night I opened the door, just to have it slammed in my face, later that night is when he used a rolled up t.v. guide, wraped in electrical tape to beat my back, black and blue, coincidently enough it was the same thing he used to beat our dog, who was named Dillon and was a rotwhieller.
>
> He cheated on my mom with my mothers best friend, which ended the relationship. The next man is who fathered my step-sister. Who other than being a drunk. no bad memories that I can recall. At the age of six, I was told to speak to a man on the phone, that was my real father. By the age of seven, he moved my mother, her boyfriend, sister, brother, and I all to Calgary, AB. Paid for the whole trip, including the rent, and filled the cupboards with groceries.
>
> Soon after, within weeks, I moved in with my father, and the mental abuse started. Convincing me my mother was no good, she didn't teach me how to shower or bathe properly, nor did she teach me how to wipe my ass, he had me at the age of seven, had me calling her a bitch, and telling her to fuck off and I never wanted to speak to her again. Then once he somehow had custody over me, which till this day I have never heard the truth. or so I think, the controling, abusive, physical punishments started. Belts, fist's, switch's, fireplace poker sticks, I had it all. School pictures with make up on to hide my blackeye's. In the hospital due to a soft spot on the top of my head due to him picking me up and slamming me on the ground. Another hospital moment was from being punched in the stomach till I puked up fluids, and green fluids until I needed to got the hospital for I.V. fluid because I was dehydrated. When I was twelve I moved back with my mom. At 14 I moved back with dad because it wasn't working with her, I was damaged and angry by that point. So I moved to halifax and met my new step mom at the christmas of 2003, I found out my father was affiliated with Hells Angels, is also the time when I started smoking marijuana.

[72] As previously noted, during his testimony on the *voir dire*, Leggette claims that he wrote a detailed journal for his lawyer on instructions from his father who was "affiliated" with the Hells Angels. Yet, in VD-6, in a writing labeled "April 8,

2014", and with the words "To Darcy Kory" on the header of each page, Leggette writes:

Page 1

To Darcy Kory April 8, 2014

On the 23rd of February, five day's after my arrest, I arrived at the correctional facility in dartmouth. With everything that has happened, up to this point, i.e. involment with Victoria's uncle, who is a member of the Hells Angels, knowing of three other people who have died, because they were a threat to Victoria, and wittnessing Victoria murder Loretta, and being threatened by Victoria, on multiple occasions that she could have me shot, I feared now more than ever that this could happen. This being the reason I put Loretta's body in the hockey bag, and packed up a few of our thing's and took Loretta's car, to leave the province, on the way, dumping her body on the side of the highway. I feared that if I called the cop's and had her arrested, she would surely send her uncle after me, so I figured the best chance I had was to keep her safe, and out of jail for as long as possible, knowing in the meantime that we would get caught, and sooner or later go to jail. I took that time, (the drive to Harrow, Ont.) to come to terms with the fact that I would have to make the decision to take the wrap for Victoria, and spend the rest of my life behind bars. I thought it would have been the smartest thing to do, and that I would be respected by her uncle enough, that he would spare my life, since I was doing the honourable thing.

After two or three day's, I received a letter (kite) from Darcy Kory, who had noticed I was having some difficulties with a particular inmate, and he seemed to notice I was so side tracked and stressed to be able to comprehend how to fit in and defend myself, he asked me to send in a request form to move into his cell with him, stated he would do the same, and that it was best for me to do so. I was wary at first, but my gut urged me to trust this person, so after I returned from

To Darcy Kory Page 2 April 8, 2014

my second court date, it had been approved by the captain, and I moved in. From the very beggining Darcy has done his best to teach me about what it is like being in prison, the ins and out's, pretty much how to survive, because as what he knew of that my case from the news and news paper, I would be going into the federal system, and the knowledge he had of being prison for 14 years altogether, would be very useful to me. Time passed, and he came to tell me he was writing a book, of his life, the people he met, and his experience's in the system, and asked if I would like to add to it. So I agreed and decided to write. I wrote point's of my life history, to help him to get to know me better. I also wrote the happening's of went on the day of Feb. 13, the day Loretta died. I wrote my fake confession. Of course Darcy read it all, and when he came across

the part's, which I spoke of Hells Angels, he asked me about it, so I broke down and told him everything.

He ended up telling me how he has been an affiliate of the organization, going on 30 years now, and explained how certain aspect's of how her uncle portraid himself were not common characteristics of how people of the organization act. We both came to the conclusion that for 2 years, Victoria has been using the uncle who is a powerful member of HA, as a ploy to control me, right down to the part of telling me my father has an $80000 hit out on him, because he is a rat, and convincing me she had three people murdered by her say so. As I said, his 30 years affiliation has given him the knowledge to say he knows without a doubt in his mind she is lying. ***So he stated to me "you have nothing to fear, and you most definately should not be throwing your life way to protect her, instead write the truth". So I did, he also***

To Darcy Kory Page 3 April 8, 2014

suggested I write a journal, because it is good filler for his book, and stated he was doing the same thing. We had planned for the true statement to be found by the inmate's so at least it would give them the idea of what really happened and take the heat off me, since I was constantly being threatened. Soon after being moved into Darcy's cell, we were moved from West 3 to West 7. Just to soon find out by another inmate that a cousin of Loretta's was on this unit. Days went by and I heard talks of a shank being produced by inmates, that was to be given to Chad, to come after me. Darcy instructed that the best way to deal with these situations was to face them head on before they come to you. So I confronted chad, told him I wasn't afraid, and told him the truth, that I did not kill loretta and in fact it was Victoria who did, and of course I entered this in as a journal entry. There was one other altercation, which once again I avoided fighting, and instead use voice of reason to calm the situation. [*emphasis added*]

The Other Inmates and Institutional Safety

[73] VD-1 contains several references to inmates who may wish to harm Leggette. Some examples of this include:

March 20, 2014 Entry 9

Went to court yesterday, to simply sign paper's, allowing and confirming for Lyle to be my lawyer, also for a second lawyer who is highly respectible and experienced in accesory after the Fact case's, who lyle believes is an asset to my case. His name is Terrance Sheppard. I arrived back at county yesterday late afternoon, to find out two things, one, my next court date is April 9 at 9:30 am, two, one of Loretta's cousin's is currently on this range, and a crack head he is, with the sharp pointy teeth and all. He arrived on the range two day's after Darcy

and I came to West 7, from the first moment I seen him, I knew there was something about him that was off, and I really do not like him, he seemed suspicious. Well last night I noticed that him and a couple of his friends were planning on making a move. …

Catlyn Sullivan } Brothers threatning from day 1

Koda Sullivan }

Journal March 7, 2014

…

Journal Entry 11

March 28, 2014

Today was a good day. I found out that Chad, Loretta's cousin was planning to make a move, and that the two inmates in cell 15 were making a shank for him, with a piece of metal they got off of the shower brush. Well Darcy told me instead of the trouble coming to me, to go to the source of the problem.

…

April 3, 2014, Entry 13

Me and Darcy have been downstair's now for a few day's. I noticed a couple day's ago that Chad (Loretta's) cousin and a few of the other inmates were making a plan to make a move on me. So with Darcy's incourage ment I went to Chad, and called him in his cell, he would not come in so the door could be shut, so I had a talk with him and he believe's I did not kill her. April 2nd, he calls me into cell #1 and claims I have been calling him a punk bitch to the other inmate's. So another talk was had . . . I can confirm that retalliation may very well come from other inmates before this is over.

The Lawyers

[74] While Leggette claimed during his testimony that he was writing VD-1 to his lawyer, there are several entries where he talks about his lawyers and does not appear to be addressing information toward his lawyers; for example, speaking about them in the third person:

Journal March 7, 2014

Entry 1Blake Leggette

Suprisingly, was called for a lawyer meeting, just to find out it wasn't Lyle Howe. Instead it was Brian F. Bailey, who is an older lawyer, who apparently recieved his certificate 12 year's before I was even born, so he's been around, and must be well respected. I told him how Victoria is the one who commited the murder while I was in the shower, he believes me.

A convict in 2 cell's down named Jurmaine was convicted of talking to a 12 yold about sex and seem's to have a few screw's loose, but yet seem's to outsmart other's on the range, so far he has gotten a radio, smoke and joint.

…

March 13, 2014 Entry 6

Day two in West 7, you can definitely tell who want's to act on there judgement that I'm the murderer, and they are simply holding back, because they are not allowed to do anything. I've been informed of another lie of Victoria's, she told me their was no Hells Angels in Halifax, and Darcy mentioned yesterday, how there are 3 patched members in this jail. Slowly but surely I'm starting to see how much of a liar she actually is, and it makes me wonder, what in the last two year's has she also lied about.

March 14, 2014 Entry 7

Yesterday officialy marked one month since Loretta Saunders passed away. Right before supper I got a call to see a lawyer, to find Lyle Howe sitting there. To find out that Brian F. Bailey straight up lied the other day, in order to get me to accept him as a lawyer. But now Lyle is on the case and we are on track to getting this case solved.

The following is a continuation of Entry one in regards to what Brian F. Bailey stated in order for me to accept him as a lawyer…

He told me Lyle was unable to accept a certificate from legal aid, and in turn was not able to represent me, stated cost's of anything that has to do with my case, Lyle would not want to pay for. Lied to me in order to get me to sign to be my lawyer after Lyle told him not to come talk to me, then went and told Lyle that I stated that I did not accept Brian as a lawyer, and only wanted Lyle, which is not what happened.

…

March 20, 2014 Entry 9

Went to court yesterday, to simply sign paper's, allowing and confirming for Lyle to be my lawyer, also for a second lawyer who is highly respectible and experienced in accesory after the Fact case's, who lyle believes is an asset to my case. His name is Terrance Sheppard. I arrived back at county yesterday late afternoon, to find out two things, one, my next court date is April 9 at 9:30 am, two, one of Loretta's cousin's is currently on this range, and a crack head he is, …

The Murder

[75] Leggette describes in detail in a variety of entries, several descriptions of the murder of Loretta Saunders. In VD-1, Leggette first writes:

February 13/2014 M Day

Loretta Saunders came to the apartment of 41 Cowie Hill Rd, Halifax, N.S. It was between 10:00 am and 11:00 am I believe, asking for the rent money which Victoria Henneberry stated to her we would have days before that in a message.

Loretta Saunders enters the apartment, and claims she is their for the rent, Victoria stated she lost her bank card and I.D. Victoria proceeds to the bedroom to make a phone call to the bank, to see about getting a new card to be able to get the money out of the account. Which is difficult to do, almost impossible without ID. At this point I am talking with Loretta about nothing but chit chat things. Loretta claims that she needs dishs because Yulchin is making a nice dinner, and proceeds to collect dishes. She is getting annoyed claims "is the rent even available" to Victoria, I responded with yes.

Loretta sits on the couch messaging on her phone.

I walk into the room to speak with Victoria. I say, "should I do it". Victoria says "you don't have the balls!"

That made me angry, and I said really, ok.

I walked out to the living room where Loretta was sitting on the couch, came up behind her all in one motion grabbed her by the throat and proceeded to choke her, she kicked off the couch and we ended up in the dining room, while I constantly had her by the throat. For some reason it wasn't working, In my mind once I started I shouldnt stop. I asked Victoria for assistance, first with a plastic bag, Loretta put up a fight and tore 3 different bags I tried to use. Finaly I hit her head twice on the floor to knock her out which worked. I proceeded to wrap her head in plastic wrap to make sure she was actually dead.

After she was officially passed away, I proceeded to place her in the hockey bag, cleaned up her Id gave Victoria her phone. I proceeded to get the car ready, taking the tires out, and placing them in front of the car, and cleaning out garbage. Carried her down the hallway, into the elevator to the main floor. Went outside, placed her on the sidewalk, and proceeded to get the car to bring to the body, (Dead weight is heavey). Parked the car, and proceeded to bring our stuff that Victoria and I packed to the car. Last but not least Victoria and our cat and I got in the car and left.

[76] A version consistent with that written by Leggette in VD-1 is found in VD-5. In the notes given by Leggette to Kory in VD-5 addressed to Kory in numerous locations, and dated March 3, 2014, Leggette writes starting at p. 5:

On February 13, 2014, Victoria and I were arguing because she did not want to be in N.S. anymore (she never seemed to be satisfied). I was just finally sick of moving around so much, and wanted to just make it work. She was so hard to be with, always wanting what she wanted and not what was needed. I was getting

sick of it, and my anger. I was trying my whole life previously to keep out of my life, was coming out, and she knew how to push my buttons. She had through out the idea, days before about killing Loretta Saunders! I never thought I would be capable of such an action, never say never!!!

Loretta Saunders walks into the apartment, obviously in our minds, wanting the rent money we owe her and she was entitled to, ($430˚˚). Victoria told her that she lost her bank card and I.D., and that that would make it difficult to get out the money. Loretta even offered to drive her to the bank. While Victoria is on the phone in the bedroom, I am pacing around trying to figure in my head, if I really want to do what Victoria wish's I would. Loretta is on the couch texting, and from what I could tell getting frustrated, especially since we portrayed ourselve's to be to be good honest people. Loretta, seeming frustrated remembers that she was meant to get some dishes for dinner Yulchin was planning on preparing, so she continues to do so. As she does this, I decide to go and see what Victoria is doing, and she is literally on the phone talking to the bank about getting into her account without a bankcard or I.D. as if she is believing her lie. I ask Victoria, "should I do it?" she says "I don't know", and continues on the phone. I pause and think, I don't want to do this, but what do I do. So I . . . decide to go and check to see what Loretta is doing. She is on the couch more frustrated, smoking, and texting.

She exclaims "Do you even have the money or what's the deal?" I said "yes". Which isn't a lie.

Walked back to Victoria who is still in the room, on the phone with the bank, I asked her again, "should I do it!" She say's "You don't have the balls".

That angered me beyond what I had left, after everything we have been through, and like I said she knew how to push my button's. I walked out to where she was sitting on the couch, and all in one motion, I grabbed her by the neck from behind, and started to choke her, she struggled until we were off the couch, kicking over the coffee table, which made a horrible mess, and ended up in the dining room. Where I continued to choke her. In my mind I say, 'you've started, you cannot stop'. For some reason choking alone wasn't working. So I grabbed a bag, and loretta being a fighter, ripped at it, so I grabbed another, again she ripped at it. Suddenly Victoria got the nerve to come out, she's almost smiling. I exclaim 'it isn't working, why isn't it working. The bag isn't working, choking isn't working." Then It occurred to me. I took her head and softly hit her head on the floor twice, and only twice, as if I was feeling bad as I commited the act.

March 4, 2014

How can I feel bad during this act, I was confused. I asked Victoria for help, as if it would help me feel better. I told her to get the plastic wrap. Loretta was already knocked out which made the task of wraping her head in the plastic easy. Satisfied that she would cause no more trouble or fight it any more, I was able to stand and breath, and look and allow to sink in what I did. I remember thinking I must be crazy because I felt relieved, stress free, all my anger from my childhood,

> and the last 2 years with Victoria all disappeared. I felt happy. Then action needed to take place, first I cleaned up the mess of the kicked over coffee table, luckily I had cigarettes to calm nerves, but believe me all I wanted was a joint, and couldn't wait to get some weed. Then we began packing our cloths, and since we had Victoria's cat, (Ceo) we needed the litter box and food. Last but not leased I picked Loretta into her grey hockey bag, yet she was the first into the car.
>
> At this point I started to get nervous, because there was know way to load the car without being seen on camera, but I proceeded anyway. Packing the vehicle was fast, before we left Victoria had a worried look on her face. She said to me "I'm scared of you now, what if you do the same to me?" I responded, "Trust me, I love you, you are the reason I'm doing this, for our future, if I was to do it to you, I would have already." I could tell she was hesitant, but kissed me anyway. Even that kiss, I knew it was the end and of our relationship would never be the same. I felt it.

[77] In VD-6, Leggette writes variously:

> February 12, 2014
>
> Victoria and I are having trouble making ends meat. Her student loan came in, and per usual, we blew through it in a day. Well most of it. I was having trouble getting work, and all she wanted to do was spend, spend with no thought of paying our bills, didn't even want to get groceries. Only what she wanted. Over the last two years I've came to just give her what she want's to save arguement.
>
> That is when the words "why don't we just kill her and leave". "I don't want to be here anymore it sucks. I don't want to be here".
>
> My nerves were shot, from stress of arguing so much, constantly for the last 2 years, I want and would do anything for her, I would take a bullet for her. Never thought I would kill for her for her own selfish reasons. I constantly believed what she has said for other issues, have pushed my family away, saying they are liers, and trying to stay and stand by her side.
>
> All my life all I've wanted was to have that one love, and I always said I would not give up if I found it, and I thought I truly did. Till this day I do not know why I've been so blinded.

[78] The description of the murder in VD-1 appears merely to be a rough draft of the more polished version given by Leggette to Kory in VD-5.

Blaming Victoria Henneberry

[79] While Leggette describes murdering Loretta Saunders by his own hand in the writings comprising VD-1 and VD-5, he also indicates in those same

documents, as well as VD-6, that he will attempt to blame Victoria Henneberry for the murder. In VD-1 he writes:

To: Darcy Kory

From: Blake Leggette

March 9, 2014 Entry 3

…Once again I woke up, forgetting I was in this place, a most horrible feeling. Darcy has lot's of story's of things he has accomplished with the organization, for only being a tattoo artist for them, raises questions in my mind about what else his affiliation may intake. But, still he seems trustworthy enough, and seem's to have my interests, my best interest's in mind, and seems to sincerely want to help. What does he have to gain by helping me? He has stated previously he doesn't want a cent from me, so what is his motive, or is there a bigger picture that I cannot see, why am I being pushed to lie about February 13, (The murder). to ensure my release, and keep Victoria locked up, knowing it's for life. Has her uncle realized she trouble and cannot have the heart to kill her, so this being a way to keep her safe, and a way for her to not cause trouble anymore??? To many questions & not enough answers. Cory (cell 10) finally came through with the joint, he gave for Darcy's bday, but since he doesn't smoke he gave it to me.

March 11, 2014 Entry 4

Today and yesterday were the same, it's been pretty quiet on the 23h lockdown range. Darcy and I are sleeping more, trying to pass by the day a bit faster, he gets up to grab breakfast bag's, then goes back to bed. I think it interesting, the type of friend's I make, and the level of respect given, it's better than dealing with the rest of the animals in this place. I know I would end up becoming one, if I did not have Darcy's influence. I have completed my defense, on the matter at hand. Victoria's true color's are becoming more clearer day by day. She has had this situation planned for quite a while, at least, I mean to get rid of me, letting me where a Nomads Ontario sweater, just to tell me she did it to get me shot . . . I've been reassured that family or not, the fact that she is talking about things she shouldn't make's her a liability to the organization, and her uncle should be steering clear away from the situation. I just hope nothing change's between her uncle and I, and I can't wait for Darcy to find out if she's been lying about that as well.

March 18, 2014 Entry 8

…Darcy say's this is going to start getting very serious. Lyle has gotten a death threat already to drop the case. But I am focusing on what I want and looking out for myself, since that is what she is doing. I don't care if she isn't the one who

actually killed Loretta, it's what I will hopefully make everyone believe. That is how I will make her pay for the last 3 years.

March 22, 2014 Entry 10

…Basically I am growing impatient, I'm angry at myself for Killing Loretta, and the fact I'm going to be blaming Victoria for it, so I don't do life in prison, but as Darcy say's she deserve's it. I'm also fighting with whether I can actually trust Darcy or not, or am I just being played, once again, being lied to again, for someone's self gain. I want to trust him, and for the moment I do trust him,

??????????????????

My defense March 11, 2014

Dear Darcy,

I right this to you now, because I feel that people should know the truth about the happenings of February 13, the day Loretta Saunders passed away. It bothers me to recall this day, for this was an innocent woman, with a promising future, and recently had found out she was to have child. It saddens me to know that within minute's, the woman that I have spent two years loving, and caring about, even through all of her controlling way's, and yes it ashame's me as a man to say that I let a woman control my life for 2 years, but that is no one's fault but my own, and to this day, I still am trying to figure out why. She controlled what I ate, how I dressed, who I talked to, pretty much everything, every aspect of my life, right down to days I was allowed to shave. I mean everything. This is the woman who has taken an innocent person's life, and the following, is the truth of what happened that day!

I awoke that day, with the daunting thought, of Victoria's word's she had stated day's before in a drunken, raging fit, one of many that I have endured, although this time I filmed it on my phone (that the investigaters have watched), simply to show her what she acted like in an atempt to steer her from drinking and treating me like a piece of shit, trying to cut herself, screaming bloody murder for no reason, (for I have never laid a hand on her), and punching herself in the stomach, saying "I hope I'm not pregnant, I hope I'm not pregnant", for we were trying, the previous year she had a mis carriage. She was saying everything in her power to hurt me. For some reason she looked at me and stated "you can't even admit you want to kill Loretta". I say to her each time she said this, "what are you talking about". For I truly had no idea what she what talking about, just Vicki talking shit in another drunk fit of hers, I now know that those word's were really thought's she was having, and something she was planning, and knowing I was video taping her, decided to incriminate me to cover her own ass, If only I would have realized this sooner, Loretta Saunders may still be alive.

April 6, 2014 Entry 14

Well things just keep coming to light more and more concerning Victoria. Jason and dad have both done their research, and certain people within the organization have tried to contact the supposed Uncle, which I had been speaking to, and he will not answer, and if he was who I was told he was, he would have answered. This person had me believing I was partially responsible for three people's death's, that I was respected, and considered family by the organization (81), just to find out it was all a control thing, that Victoria was using. Now I find out that this whole year, she's been twisting things, telling certain people that I'm saying shit that I know I haven't said, and shit I know should not be said. I can't believe she actually had been trying to get me killed, what have I possibly done wrong to deserve that, oh right, nothing, but love her unconditionally, and try to help her, when she didn't need or want it. These three years have been nothing but lies and deciet. I hate her with everything in me, and with all the god's of this earth she will be going away for 25 to Life, no matter what the truth is, …

[80] Why would Leggette write to his lawyer of possible plans to potentially "frame" his co-accused?

Wanting to Kill Again

[81] Leggette also states in these writings that he not only killed Loretta Saunders but infers he enjoyed it and plans to kill again. This is clearly not something a client would write to his lawyer, and instead is something that might appear in a biography or autobiography, possibly for dramatic effect or to try to boost book sales:

My defense March 11, 2014

Dear Darcy,

…As it stands, the only family I have is the organization of the Hells Angels, or at least that is what her uncle told me, that I am considered family, if that still stand's. If it doesn't then I am alone in this world, and have the option to start anew life, and controll it as I see fit.

My old family and friends are dead to me, and they will never hear from me again. In the end, I murdered a woman, and even now as I did that day, it does not bother me, I think I wanted to do it, as much as Victoria wanted me too.

If it wouldn't have been Loretta Saunders, it would have been someone else, and she probably won't be the last, I struck a nerve that afternoon, a thirst, it will never be a woman, that I can promise, it will be someone who deserves it, and that someone knows who it is, someone who has moulded me into the person I am today. Darcy say's I put the wrong one in the bag, but I think

> **she will hurt more, knowing after everything she has done to me, I've done this to her.**
>
> I will always's remember you Victoria Henneberry and know, I did love you, and there was a day I would have died for you, but you stabbed me in the back, spit on me and pushed [and] slapped me for the last time. You could have had it all, all you had to do was love me the way I loved you and treated me the way a partner should have. [*emphasis added*]

[82] This sentiment is repeated in VD-5 at p. 9 where Leggette describes the murder of Ms. Saunders by his own hand and then says:

> I remember thinking I must be crazy because I felt relieved, stress free, all my anger from my childhood, and the last 2 years with Victoria all disappeared. I felt happy.

Book Deal

[83] Some of the entries from VD-5 already referenced provide significant clarification as to the purpose of VD-1, in particular the April 8, 2014 entry:

> After two or three day's, I received a letter (kite) from Darcy Kory, who had noticed I was having some difficulties with a particular inmate, and he seemed to notice I was so side tracked and stressed to be able to comprehend how to fit in and defend myself, he asked me to send in a request form to move into his cell with him, stated he would do the same, and that it was best for me to do so. I was wary at first, but my gut urged me to trust this person, so after I returned from
>
> To Darcy Kory Page 2 April 8, 2014
>
> my second court date, it had been approved by the captain, and I moved in. From the very beggining Darcy has done his best to teach me about what it is like being in prison, the ins and out's, pretty much how to survive, because as what he knew of that my case from the news and news paper, I would be going into the federal system, and the knowledge he had of being prison for 14 years altogether, would be very useful to me. Time passed, and he came to tell me he was writing a book, of his life, the people he met, and his experience's in the system, and asked if I would like to add to it. So I agreed and decided to write. I wrote point's of my life history, to help him to get to know me better. I also wrote the happening's of went on the day of Feb. 13, the day Loretta died. I wrote my fake confession. Of course Darcy read it all, and when he came across the part's, which I spoke of Hells Angels, he asked me about it, so I broke down and told him everything.

[84] The Crown argues that Leggette's writings were all drafts for a book that he was either writing himself, writing in conjunction with Kory or that Kory was writing. Kory says that he offered to have Leggette move to his cell under the guise of helping to protect Leggette from the other inmates but in actuality to manipulate him into providing information for the book. I do not place any weight on Kory's *viva voce* evidence, however, VD-5 contains a very interesting item: a small piece of paper that on the front is written "Hallal Meal" and on the back is written:

> I will accept your offer, and have just now asked for a request form. I will keep this short and we will speak soon.
>
> Blake

[85] Could this have been Leggette's acceptance of Kory's offer to move into his cell by way of a prison "kite"?

[86] The true purpose of VD-1, VD-5 and parts of VD-6 is also supported by several entries found in VD-1:

> March 8, 2014 Entry 2
>
> I hate the weekends here, you get a brunch, instead of the 3 meals, you only get 2.
>
> I try to sleep in as much as possible on these day's. Darcy is still being harassed by Cory in cell 10, he acctualy had the nerve to pretty much start demanding the canteen and now the headphones Darcy gave me, he figures he should have them over me just because of charge's I am up against. Per usual Reggie, another inmate, the usual cleaner, was mopping outside the door, and I purposely stated that all the inmates should get off my back, since I'm not the on who killed Loretta Saunders. Victoria is the one, which is what we want people to believe, since I've said nothing and Victoria is speaking like a leaky faucet, after everything I've done for her, she's turned to being a rat, and looking out for just her, so im doing the same. difference is, she will going away for life, and ***I'll be out in a few years with at least one book, maybe two. This incident/murder is now world wide new's, and the native's are eating it up, trying to get as much money as possible. And I want some of it. $$$ $$$$$$***
>
> And I know I'm getting realeased because I get nothing but good gut feelings about and all my dreams since I've been here have been dreams of release.
>
> [*emphasis added*]

March 12, 2014 Entry 5

…We are now on a range where there are multiple inmate's out at once, and honestly I feel comfortable, I also realize if it wasn't for Darcy, things would be very different for me. We recieved the brew Cory (W3-cell 10) has been making for Darcy's birthday, and I even have a joint, comfort is definately making the process easier on the head. If everyday from now, till I get to B.C. Penetentry is like this, I'm In. ***I can't wait to get the book deal on the go, and hopefully it will be as profitable as Darcy say's***. [*emphasis added*]

March 22, 2014 Entry 10

…I'm feeling controlled because Darcy isn't letting me do anything about it, which I understand, because I can't be getting in trouble, or fight's, especially before my trial and he's only trying to help. . . . Number three, I'm sick of this place and the imature pieces's of shit in this place, and just want to get the trial over with, deal with the outcome, and get to B.C., and get into the federal system, where Darcy say's it is so much better. ***I want to get this book deal thing on the go, if it is even going too, and am writing all this down for nothing***.

[*emphasis added*]

[87] The final page of VD-1, page 35, is comprised of the following writings which confirm this was for a book draft, not confidential information for a lawyer:

People I would like to be mentioned in the book

Catlyn Sullivan - Was the first person on West 3, who started to threating me first, who apparently knew Loretta's grandmother, but made it seem like to me that he had a personal connection to Loretta

Kota Sullivan - came onto the unit a couple weeks after I arrived, and day's after I moved into Darcy Kory's cell. His threats were simpler and quieter as if he was just going along with his younger brother trying to scare me, knowing they could never get to me.

Travis Jackson - Is oddly enough a type of friend, has never passed judgement on me, and has just plainly respected me for the type of person I am. He is one nosy little man tho, and love's his drug's, he's loud and seem's to not have a common sense bone in his body

Beefy - Is the drug dealer of the range's I have been on, and seems to like and respect me for the type of person I am. And we have a few common friends on the outside

Darcy Kory - Has been my protection, and the person who has given me the insperation and idea to right this book, with his jail experience and knowledge, his

> teaching's are what has helped me to this point and onward. Without him I would more than likely me in the hospital or dead already. Not only his jail experience and knowledge, but his connection's to the Hell's Angels has given him the power to protect me. I always's seem to attract these people, and gain their respect very easily. [*emphasis added*]

Solicitor-Client Privilege

[88] Although the *Charter* issues may generally be the more logical starting point for the analysis of the admissibility of VD-1, the issue of whether or not these documents were solicitor-client privileged spills over into that analysis. Therefore, I will deal with the solicitor-client privilege issue first.

[89] According to *Wigmore on Evidence* (McNaughton rev. 1961), vol. 8 at § 2292, at p. 554:

> Where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor except the protection be waived.

[90] *Wigmore* goes on to say, at para. 2285, that the four fundamental conditions necessary to establish a privilege against the disclosure of communications are as follows:

> l. The communication must originate in a *confidence* that they will not be disclosed.
>
> 2. This element of *confidentiality* must be *essential* to the full and satisfactory maintenance of the relation between the parties.
>
> 3. The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
>
> 4. The injury that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

[91] In *R. v. Solosky*, [1980] 1 S.C.R. 821, Dickson J. (as he then was) speaking for the majority, detailed the law relating to solicitor-client privilege in a prison setting, beginning at page 833:

> The determination of the right of prison inmates to correspond, freely and in confidence with their solicitors, is of great practical importance, although, admittedly, any such determination relates to correspondence not yet written.

> However poorly framed the prayer for relief may be, even as twice amended, the present claim was clearly directed to the procedures for handling prison mail and the invocation in relation thereto of solicitor-client privilege.
>
> . . .
>
> …It is not directed to the characterization of specific and individual items of correspondence. If the appellant is entitled to a declaration, it is within this Court's discretion to settle the wording of the declaration: see De Smith, *Judicial Review of Administrative Action* (3rd ed. 1973, p. 421). Further, s. 50 of the *Supreme Court Act* allows the Court to make amendments necessary to a determination of the "real issue", without application by the parties.

[92] Dickson J. detailed certain exceptions to solicitor-client privilege at page 833:

> As I have indicated, the main ground upon which the appellant rests his case is solicitor-client privilege. The concept of privileged communications between a solicitor and his client has long been recognized as fundamental to the due administration of justice. As Jackett C.J. aptly stated in *Re Director of Investigation and Research and Shell Canada Ltd*. [(1975), 22 C.C.C. (2d) 70, [1975] F.C. 184], at pp. 78-9:
>
> > …the protection, civil and criminal, afforded to the individual by our law is dependent upon his having the aid and guidance of those skilled in the law untrammelled by any apprehension that the full and frank disclosure by him of all his facts and thoughts to his legal advisor might somehow become available to third persons so as to be used against him.
>
> The history of the privilege can be traced to the reign of Elizabeth I (see *Berd v. Lovelace* [(1577), 21 E.R. 33] and *Dennis v. Codrington* [(1580), 21 E.R. 53]). It stemmed from respect for the 'oath and honour' of the lawyer, dutybound to guard closely the secrets of his client, and was restricted in operation to an exemption from testimonial compulsion. Thereafter, in stages, privilege was extended to include communications exchanged during other litigation, those made in contemplation of litigation, and finally, any consultation for legal advice, whether litigious or not. The classic statement of the policy grounding the privilege was given by Brougham L.C. in *Greenough v. Gaskell* [(1833), 39 E.R. 618], at p. 620:
>
> > The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection (though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers).

> But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.

The rationale was put this way by Jessel M.R. in *Anderson v. Bank of British Columbia* [(1876), 2 Ch. 644], at p. 649:

> The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have resource to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation.

Wigmore [8 Wigmore, *Evidence* (McNaughton Rev. 1961] para. 2292] framed the modern principle of privilege for solicitor-client communications, as follows:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the purpose made in confidence by the client are at his instance permanently protected from disclosures by himself or by the legal adviser, except the protection be waived.

There are exceptions to the privilege. The privilege does not apply to communications in which legal advice is neither sought nor offered, that is to say, where the lawyer is not contacted in his professional capacity. Also, where the communication is not intended to be confidential, privilege will not attach, *O'Shea v. Woods* [[1891] P. 286], at p. 289. More significantly, if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant. The classic case is *R. v. Cox and Railton* [(1884), 14 Q.B.D. 153], in which Stephen J. had this to say (p. 167): "A communication in furtherance of a criminal purpose does not 'come in the ordinary scope of professional employment'."

[93] In *Solosky,* Justice Dickson points out the following criteria for privilege at p. 837:

> As Mr. Justice Addy notes, privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege—(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties. To make the decision as to whether the privilege attaches, the letters must be read by the judge, which requires, at a minimum, that the documents be under the jurisdiction of a court. Finally, the privilege is aimed at improper use or disclosure, and not at merely opening.

[94] The Supreme Court of Canada concluded at p. 840 of *Solosky* that when reading letters prepared by inmates the following criteria apply:

> Most prisons are sufficiently remote that the mail constitutes the prime means of communication to an inmate's solicitor. Nothing is more likely to have a "chilling" effect upon the frank and free exchange and disclosure of confidences, which should characterize the relationship between inmate and counsel, than knowledge that what has been written will be read by some third person, and perhaps used against the inmate at a later date. I do not understand counsel for the Crown to dispute the importance of these considerations.
>
> The result, as I see it, is that the Court is placed in the position of having to balance the public interest in maintaining the safety and security of a penal institution, its staff and its inmates, with the interest represented by insulating the solicitor-client relationship. Even giving full recognition to the right of an inmate to correspond freely with his legal adviser, and the need for minimum derogation therefrom, the scale must ultimately come down in favour of the public interest. But the interference must be no greater than is essential to the maintenance of security and the rehabilitation of the inmate.
>
> The difficulty is in ensuring that the correspondence between the inmate and his solicitor, whether within the doctrine of solicitor-client privilege or not, is not cloaking the passage of drugs, weapons, or escape plans. There must be some mechanism for verification of authenticity. That seems to be generally accepted. Yet, no one has so far suggested what third party mechanism might be adopted, or by what authority the courts could impose such a mechanism upon penitentiary authorities.

[95] Additionally, the relevant legislation addresses the issue of solicitor-client privilege. Subsection 61(2) of the *Correctional Services Regulations*, made under s. 94 of the *Correctional Services Act*, states:

Certain correspondence exempt from inspection

61(2) If written material from an offender purports to be addressed to a person or office referred to in Section 56 of the Act or subsection (1) but is incorrectly addressed, the superintendent may bring the error to the offender's attention and, if the offender does not agree to the correction of the address, the superintendent may open and inspect the material in the offender's presence.

[96] Sections 56 and 65 state:

Correspondence

56 Subject to the regulations and except for privileged correspondence between an offender and the offender's lawyer, the superintendent may inspect all correspondence coming into or going out of a correctional facility, including parcels, written material and material stored by electronic or magnetic media.

Seizure

65 An authorized employee may, during a search, seize an object or substance if the employee believes, on reasonable grounds, that object or substance is

(a) contraband; or

(b) evidence relating to

(i) the commission of an offence, or

(ii) the contravention of a rule.

[97] Therefore, the superintendent of the Burnside Jail has the authority to review all correspondence coming into or going out of the correctional facility and, if it is believed that the material may contain solicitor-client privileged information, can inspect the material in the offender's presence.

[98] Cacchione J. reviewed the law of solicitor-client privilege in *R. v. Morris*, [1992] N.S.J. No. 524 (Co. Ct.) and at p. 6 of that case (Quicklaw Version) discussed the broad circumstances where this privilege may apply:

> In *Descoteaux et al. v. Mierzwinski and the Attorney General of Quebec et al.* (1983), 70 C.C.C. (2d) 385, a case which involved the police search of a legal aid office in order to obtain an application form filed by a client, the Supreme Court of Canada held that the confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed, without the client's consent. Lamer, J., speaking for the Court, at p. 400, set out the substantive rule as follows:

> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
>
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
>
> 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the end sought by the enabling legislation
>
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.
>
> The privilege protecting from disclosure communications between solicitor and client is a fundamental right - as fundamental as the right to counsel itself since the right can exist only imperfectly without the privilege. (*R. v. Littlechild* (1979), 51 C.C.C. (2d) 406).
>
> In *Re Direction of Investigation in Research and Shell Canada* (1975), 22 C.C.C. (2d) 70, Thurlow J. spoke about when the privilege arises. At p. 80 he stated:
>
> > …It appears to me that the confidential character of such communications, whether oral or in writing, comes into existence at the time when the communications are made. As the right to protection for the confidence, commonly referred to as legal professional privilege, is not dependent on there being litigation in progress or even in contemplation at the time the communication takes place, it seems to me that the right to have the communication protected must also arise at that time and be capable of being asserted on any later occasion when the confidence may be in jeopardy at the hands of anyone purporting to exercise the authority of the law.

[99] As Justice Cacchione noted in *Morris* at p. 6, the existence of solicitor-client privilege can arise even before a formal retainer between lawyer and client is entered into:

> The existence of solicitor-client privilege arises even before a formal retainer between lawyer and client is entered into. At 413 of *Descoteaux v. Mierzwinski* Lamer J. summarized his conclusions in the following fashion:
>
> > In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether

> communications are made to the lawyer himself or to employees, and whether they deal with matters of administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.

In dealing with the question of whether the privilege nature of a document is lost once a person other than the solicitor of his agent becomes aware of its existence, the case of *Regina v. Kotapski* (1981), 66 C.C.C. (2d) 78 is very helpful. In that case the accused was charged with robbery and prepared for the use of his lawyer a statement of his activities on the date in question. The statement was given to the lawyer and kept in the lawyer's files. Sometime later the accused decided to retain another lawyer and he instructed his first lawyer to send a copy of that statement to his (the accused's) wife. The police searched the accused's residence and seized the copy of the statement which the Crown sought to introduce into evidence. Counsel for the accused argued that the statements were inadmissible by virtue of a solicitor-client privilege, however the Court held that the statements were admissible. Greenberg J. referred to 8 *Wigmore on Evidence* (McNaughton revision, 1961) pp. 633-4, para. 2326, to quote the following:

> Third Person's Overhearing. The law provides subjective freedom for the client by assuring him of exemption from its processes of disclosure against himself or the attorney or their agents of communication. This much, but no more, is necessary for the maintenance of the privilege. Since the means of preserving secrecy of communication are largely in the client's hands and since the privilege is a derogation from the general testimonial duty and should be strictly construed, it would be improper to extend its prohibition to third persons who obtain knowledge of the communications. One who overhears the communication, whether with or without the client's knowledge, is not within the protection of the privilege. The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy.

The Court in *Regina v. Kotapski* reaffirmed the rule that the privilege is that of the client's and that disclosure will not be allowed except with the client's consent.

[100] In *R. v. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13, the Ontario Court of Appeal confirmed at pp. 36 and 42:

> An essential condition of the solicitor-client privilege is that the communication in respect of which privilege is claimed has been made in

> circumstances which indicate that it was made with the intention of confidentiality. Generally, if the communication is intended to be revealed to a third person, the element of confidentially will be lacking. Similarly, in most cases the presence of a third person when the communication was made indicates that the communication was not intended to be confidential. But the presence of a third person may not have that effect; for example, it will not have that effect if it is reasonably necessary for the protection of the client's interest: see 8 *Wigmore on Evidence*, 3rd ed. (McNaughton Revision, 1961), pp. 599-603; *McCormick on Evidence*, 2nd ed. (1972), pp. 187-9; *Cross on Evidence*, 5th ed. (1979), p. 289.
>
> . . .
>
> As I have previously indicated, the learned trial judge should have granted the request for a *voir dire* to determine the circumstances under which the third document, that is the notes, came into the possession of Mr. Ducharme. Counsel for the appellants and for the Crown on the appeal, however, argued the case on the basis that this document was found by Dunbar in Bray's cell. In my view, the privilege was dissolved if Dunbar, even surreptitiously removed the notes from Bray's cell. *Wigmore on Evidence* (McNaughton Rev.), vol. 8, states at p. 633:
>
> > All *involuntary* disclosures in particular, through the loss or theft of documents from the attorney's possession, are not protected by the privilege, on the principle (§2326 *infra*) that, since the law has granted secrecy so far as its own process goes, it leaves to the client and attorney to take measures of caution sufficient to prevent being overheard by third persons. The risk of insufficient precautions is upon the client. This principle applies equally to documents.

[101] In *Samson Indian Band v. Canada*, [1995] F.C.J. No. 734 (C.A.), the Federal Court of Appeal emphasized at paras. 8 and 9:

> **8** Today, it is generally recognized that there are two distinct branches of solicitor and client privilege: the litigation privilege and the legal advice privilege. The litigation privilege protects from disclosure all communications between a solicitor and client, or third parties, which are made in the course of preparation for any existing or contemplated litigation. The legal advice privilege protects all circumstances, written or oral, between a solicitor and a client that are directly related to the seeking, formulating or giving of legal advice; it is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communication in which the solicitor tenders advice; it is not confined to telling the client the law and it includes advice as to what should be done in the relevant legal context.
>
> **9** The principles relating to solicitor and client privilege apply in both civil and criminal cases, and they apply regardless of whether the solicitor is in private practice or is a salaried or government solicitor.

[102] Both Crown and defence agree that since Leggette is raising the issue of solicitor-client privilege, the burden is on him to prove that privilege exists in this case. Crown and defence agree that the burden of proof is on the civil standard of a balance of probabilities as detailed in *R. v. Bonnell*, 2012 NBQB 34.

[103] Each document must be examined to determine whether it falls within the class of solicitor-client privilege. Here, Leggette admits being the author of VD-1, claims privilege over all of VD-1 and does not distinguish between any of the 35 pages comprising VD-1. He says VD-1 is all one single document. VD-2 is purported to be the white label that fell off of VD-1 when Lucas commenced her search. VD-5 and VD-6 are writings attributed to Leggette and produced by Kory. Leggette does not object to the admissibility of VD-5 and VD-6 on this *voir dire*. He says that if VD-1 is admitted then he will not object to the admission of VD-5 and VD-6. If VD-1 is excluded, he will argue against the admission of VD-5 and VD-6 at trial. While Leggette does not formally admit to having authored VD-5 and VD-6, their authenticity was not seriously challenged.

[104] During the *voir dire*, Leggette testified that VD-1 was a cathartic journal written to himself as background information and instructions for his yet-to-be-determined lawyer but addressed to Darcy Kory. When asked at the Preliminary Inquiry why he did not just say "Property of Blake Leggette" or "To my lawyer", he apparently had no answer to that question. He said although VD-1 was addressed to Kory, he really was just using Kory as a muse, similar to his allegedly writing a journal to Harry Potter when he was a child. Leggette testified at the Preliminary Inquiry about this same issue. As pointed out by counsel on the *voir dire*, when asked at the Preliminary Inquiry why he wrote "To Darcy Kory" on the tube, he said it was to identify that it belonged to himself, not to Darcy Kory. Leggette did not say at the Preliminary Inquiry that his mother had suggested he write to someone he might admire. He did not say he had written a previous journal to Harry Potter. In addressing this point on this *voir dire*, Mr. Sheppard states for Leggette:

> **MR. SHEPPARD:** My Lord we have had a discussion about that and we have agreed that. We have agreed that I can read to you a portion of the preliminary inquiry transcript and in this portion of the preliminary inquiry transcripts Ms. Driscoll is asking Mr. Leggette about the journal entries in *voir dire* 1.
>
> **THE COURT:** What page and line are you on?
>
> **MR. SHEPPARD:** 134

THE COURT: Page 134, line?

MR. SHEPPARD: I am going to start with line 4, question from Ms. Driscoll:

> **MS. DRISCOLL:** I guess my issue is with…this is a third party and do you know what I mean by that? Like, you're not saying dear Mr. Sheppard, this is what's going on today. This is like a third party discussion, correct? You were discussing a meeting you had with someone else. You're not addressing it to anyone, is that…would you agree with me there?
>
> **A.** Yes, I'm discussing it with…it's…it's the way that I write, it's discussing it with myself.
>
> **Q.** Right, okay. So you title it a journal entry and you're discussing …
>
> **A.** Like as if I'm talking like when…when a child writes…writes a diary, they're talking to their imaginary friend or…or talking directly to their diary.

MR. SHEPPARD: So I certainly agree that the information provided by Leggette today when he talked about his childhood and diarize and he would address that diary to Harry Potter is something new, he did not say that at the Preliminary Inquiry but he did give a similar answer at the preliminary inquiry about talking to an imaginary friend or talking to the page. So I don't see that the court can put much weight on, it's not a huge enough gulf there that the court can say look he is just sure up his evidence from the preliminary inquiry as I think my friend is trying to suggest. Next point the court said that if an inmate, if a lawyer asks his client who is an inmate in a correctional institution to write up what's happened, tell me all about you and what happened that day if this evidence is not excluded I would respectfully suggest that no lawyer's going to ask their client who happens to be incarcerated to ever do that again. It would be very problematic for any defence counsel to give advice to their clients, you know give me all the information, write it all up for me and give it to me the next time you see me. If they did give that advice and even if they marked it legal, and even if they told the correctional staff that's for my lawyer it could still end up being evidence. Once he saw the writings were taken after the search, he was concerned, not panicked. Knew what was in there could get him into a lot of difficulty.

[105] The Crown cross-examined Leggette as to why, if the documents were truly intended for his lawyer, he had not given them to his lawyer prior to the search on April 8, 2014. Of course, the Crown's cross-examination of Leggette pre-dates the delivery of VD-5 and VD-6 wherein Leggette explains the purpose of VD-5 as being background for Kory's book. Leggette testified at the *voir dire* regarding this issue as follows:

Q. You know that that would not be a good thing to do, to pin a murder on someone.

A. It would be di -- it would be dishonest, yes.

Q. Right. And you wouldn't involve a lawyer in something like that.

A. I would have to seek advice about that.

Q. You – I'm going to ask you to refer once more to *voir dire* exhibit 1, and we're at page 8.

A. Okay.

Q. I think -- actually I apologize, I may have the wrong page, just hold on. Yes, I apologize, March -- page 12, entry 9, March 20th, 2014.

A. Okay.

Q. I'm just going to read that out for the record, "Went to court yesterday to simply sign papers allowing and confirming for Lyle to be my lawyer, also for a second lawyer who is highly respectable and experienced in an accessory after the fact cases, who Lyle believes is an asset to my case, his name is Terrance Sheppard." You wrote that, correct?

A. Yes.

Q. So that was written on March 20th. You'd agree with me you went to court on March 19th?

A. I can't agree with you cause I'm not exactly sure.

Q. Okay. So, in the in the writing it said "went to court yesterday".

A. Okay, well, then yeah, I -- yeah.

Q. And, so you'd agree with me that all of your entries and writings that you had done up until March 20th, you could have taken to court with you on March 19th for your lawyer?

A. If I were to be finished with what I was doing, yes. Just let me -- I could have, not necessarily should have, necessarily, but…

Q. Okay. So you had written 12 pages of *voir dire* exhibit 1, by this point. We are on page 12, right?

A. Of the journal entries I've -- I'm not sure exactly what the dates were or whether on the dates of which I wrote the rest of it that wasn't journal entries.

Q. Okay.

A. I'm sure if I even had those accomplished yet at that point.

Q. You had done some writing by that date.

A. Yeah.

Q. By the date you went to court.

A. Yes, I agree

Q. You didn't take it with you to court.

A. No.

Q. And it just happened to get seized by correctional officers the day before you intended to give it to your counsel.

A. Well, at that point I was pretty sure who was going to be my counsel, I think.

Q. So on March 20th, this entry here, you said you "went to court and signed papers confirming for Lyle to be my lawyer".

A. Yes.

Q. So, on that date, you believed Lyle was going to be your lawyer?

A. And then I believe it was just nearly days after that, before that court date on the 19th that Lyle's issues had started arising, so…

Q. And Lyle had also joined a second lawyer, Mr. Terry Sheppard, correct?

A. Yes, for -- I believe he says for assistance…

Q. Okay.

A. …in the case.

Q. But you're – you're telling the court that you were going to court April 9th. Right?

A. Yes.

Q. And the papers just happened to be seized. You had intended to take them to court April 9th?

A. Yes.

Q. So you were all done your writing by April 9th -- or April 8th, I should say?

A. Give or take, I could -- could add a little bit more to the life story part of it, but more or less.

Q. So they were taken the very day before you were going to hand them over to your lawyer?

A. Strangely enough.

[106] The Crown also cross-examined Leggette about his claim that VD-1 was not a draft for a book deal:

Q. So now I'm at March 12, 2014, entry No. 5, and I will just see -- still on page 10…

A. Uh hmm.

Q. "Today is a better day, the dream I had about moving cells has actually happened. My premonitions are getting stronger through this situation. We are now on a range where there are multiple inmates out at once. Ironically, I feel comfortable."

A. Yeah.

Q. "I also realize if it wasn't for Darcy, things would be very different for me. We received the brew, Cory S3…" I think "…Cell 10, has been making for Darcy's birthday, and I even have a joint, comfort is definitely the process easier on the head. If every day from now till I get to B.C. Penitentiary is like this, I'm in. I can't wait to get the book deal on the go, and hopefully it will be as profitable as Darcy says." So you'd agree with me those are your writings, correct?

A. Correct.

Q. You're discussing the book deal and how much money you were going to make on it, correct?

A. Discussing the book deal, yes

Q. And how profitable -- you said I hope it will be as profitable as Darcy says. So you -- so -- sorry, when you nod, you have to say yes or no.

A. Yes.

Q. So you're discussing with Darcy the profit of the book, correct?

A. Yes.

Q. So these discussions certainly weren't confidential, if you're discussing them with Darcy.

A. Uh, discussions about my life and what-not, weren't necessarily as confidential…

Q. Well…

A. **…**as the rest of the writings which pertain to the actual murder itself.

Q. So when you said that the natives were making money off of this, you were referring to the Loretta Saunders' homicide, correct? Not to the background of your life.

MR. SHEPPARD: Objection. He did not say the natives were making money off this, My Lord.

MS. DRISCOLL: I can refer back to…

THE COURT: Why don't you just use the exact quote?

MS. DRISCOLL: I will, thank you. So, it's page 8 of VD-1. Okay. "This…" I'll read the exact quote. "This incident/murder is now worldwide news and the natives are eating it up, trying to get as much money as possible. And I want some of this $$$..." Does that sound accurate to what you wrote?

A. It looks accurate, yes.

Q. Okay. So, your book deal was about, when you say incident/murder, the murder of Loretta Saunders, correct?

A. Yes.

Q. And that was what you were looking to make money off of, correct?

A. No.

Q. Okay. Well, the natives weren't eating up any -- they weren't interested in any – I'll just see how I can phrase this. You're not suggesting that the natives are interested in your childhood history, correct?

A. Correct.

Q. So the book deal was not about your childhood and the past, you weren't going to make any money off of that, correct?

A. I may have or may not have.

Q. Only if it's linked to this incident/murder that you refer to on page 8, right?

A. Sorry, repeat that.

Q. So, any book deal that you might make, where you're discussing your childhood is only going to be interesting if it's connected to the incident/murder that you refer to on page 8, correct?

A. It may have influenced my name per se.

Q. Right. And certainly you mention "natives" because Ms. Saunders was of native heritage, right?

A. Yes. I found out afterwards, yes.

Q. Okay. So what I'm suggesting to you is that you're discussing profit from a book deal related to the murder/incident that you refer to, correct?

A. No, it's not related to the murder.

Q. So you were going to write a book about your childhood, but not about this incident.

A. Almost like an autobiograph – biograph -- I'm not sure how to say the word.

Q. Autobiographical.

A. Like an autobiography.

> **Q.** Which would include, and I'm not getting into anyone's involvement, but the fact that you were charged with this crime.
>
> **A.** I don't know, I wasn't planning on writing the book, so I -- if there was even any book going to be, so…
>
> **Q.** Anything that you wrote, any sort of autobiography, which records your life, would include that you were charged with this crime. Correct?
>
> **A.** It may or may not have. It's…
>
> **Q.** So you would write the story of Blake Leggette and not mention this part.
>
> **A.** Well, considering no -- no profit can be made off a crime that you -- that you commit, then I highly doubt it would have, if the book were -- were to be…
>
> **Q.** So you got legal advice about whether you could make money off writing about a crime that you committed?
>
> **A.** I wouldn't say it's nearly -- really legal advice, it came out in conversation.

[107] While the proper analysis for privilege involves a document-by-document examination, in this case Leggette argues that all 35 pages of VD-1 are one single document. Therefore, this is "an all or nothing" situation, that is, the 35 pages must meet the requirement for privilege.

[108] In determining the guidelines to be followed by prison administrators in balancing the competing interests between safety and solicitor-client privilege, the Supreme Court of Canada stated at pp. 841-842 of *Solosky*:

> In my view, the "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege" should be interpreted in such manner that (i) the contents of an envelope may be inspected for contraband; (ii) in limited circumstances, the communication may be read to ensure that it, in fact, contains a confidential communication between solicitor and client written for the purpose of seeking or giving legal advice; (iii) the letter should only be read if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary to determine the *bona fides* of the communication; (iv) the authorized penitentiary official who examines the envelope, upon ascertaining that the envelope contains nothing in breach of security, is under a duty at law to maintain the confidentiality of the communication. …

[109] VD-2 may or may not have had the word "legal" written on it when Lucas seized the brown cylinder. Lucas did not recall seeing the word "legal" written on the white label and her notes do not suggest that the word "legal" was written on the label. Leggette says the word "legal" was written on the label. From a

comparison of VD-1, VD-5 and VD-6, it does not appear that Leggette was aware of the significance of placing the word legal on his documents for protection prior to the search of April 8, 2014. He was likely more sensitive to possible deficiencies in his labeling of VD-1 after the documents were seized.

[110] The Crown alleges that Leggette likely wrote the word "legal" on the label after he found it discarded by Lucas in his cell. Lucas did not have accurate notes in other aspects of the search (whether she saw the word "weapon" versus "shank" for instance). However, Leggette appeared to be under the mistaken impression that writing "To Darcy Kory-Personal and Confidential" would prevent authorities from reading his writings. If the word "legal" was originally on VD-2, and I am not convinced it was, it was only placed there by Leggette to avoid having writings read by prison officials, not because it was ever intended for a lawyer. More likely than not Leggette added the word "legal" to VD-2 sometime after the cell search in an *ex post facto* attempt to conduct damage control after the cell search.

[111] There are other examples of this sort of attempt by Leggette at damage control after the search, such as his referring in VD-5 and VD-6 variously as having written his "fake confession", writing an apology letter to the family of Loretta Saunders and, of course, claiming in *Central Nova Scotia Correctional Facility Offender Request Form* that VD-1 was intended for Kory's lawyer. It really does not matter whether the word "legal" was on VD-2. What matters is whether the dominant purpose of VD-1 was for obtaining legal advice or to aid in litigation, whether for a retained lawyer or a lawyer to be retained in the future.

[112] As Cacchione J., noted in *Morris, supra,* at para.32:

> In *Davies v. Harrington* (1980), 39 N.S.R. (2d) 258, the Nova Scotia Court of Appeal in dealing with the question of whether documents prepared in contemplation of litigation are privileged referred with approval to the comments of Lord Edmund Davies in *Waugh v. British Railway Board,* [1979] 3 W.L.R. 150 (H.L.). At p. 267 Macdonald J.A., speaking for our Court of Appeal, quoted Lord Edmund Davies as follows:
>
> > Having considered the decisions, the writings and the various aspects of the public interest which claim attention, I have come to the conclusion that the court should state the relevant principle as follows: a document which was produced or brought into existence either with the dominant purpose of its author or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid

> in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

[113] Therefore, if VD-1 was produced with the dominant purpose of obtaining legal advice or to aid in litigation then it should be considered privileged. From a review of VD-1, VD-5 and VD-6 as well as the testimony on this *voir dire,* in my opinion VD-1 was essentially a rough draft of VD-5, the notes provided by Leggette to Kory for his book. VD-1 was also likely Leggette's own rough notes for a book he may have intended to write. VD-1 was not produced to obtain legal advice or to aid in the conduct of litigation. VD-1 is not a privileged document.

Charter Motion

[114] The defence also argues that Leggette's s. 7, s. 8, and s. 11(d) *Charter* rights have been violated. Prison officials have the ability to search prison cells according to specific statutorily prescribed guidelines. Leggette argues that prison officials did not follow their own guidelines and as a result his right to be free from unreasonable search and seizure as guaranteed by s. 8 of the *Charter* was infringed. The remainder of his *Charter* arguments really flow from the illegal search allegation. As a result, Leggette argues that the writings should be excluded in accordance with s. 24(1) of the *Charter*.

[115] As noted above, prison officials have authority to conduct a general search in accordance with s. 61 of the *Act* if the following conditions are met:

> 61 (1) Subject to subsection (3), an authorized employee may, in accordance with subsection (2), without individualized suspicion, conduct routine searches in the prescribed circumstances, which circumstances must be limited to what is reasonably required for safety and security purposes.
>
> (2) The searches may be of
>
> (a) any person in or on a correctional facility or that person's property;
>
> (b) a correctional facility or any property of or on a correctional facility, including vehicles in or on a correctional facility.
>
> (3) Where the search referred to in subsection (1) is a strip search, the circumstances referred to in subsection (1) must be limited to situations in which the person has been in a place where there was likelihood of access to contraband that is capable of being hidden on the body.

[116] As the Supreme Court of Canada noted in *Solosky* at pp. 841-842:

> In my view, the "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege" should be interpreted in such manner that (i) the contents of an envelope may be inspected for contraband; (ii) in limited circumstances, the communication may be read to ensure that it, in fact, contains a confidential communication between solicitor and client written for the purpose of seeking or giving legal advice; (iii) the letter should only be read if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary to determine the bona fides of the communication; (iv) the authorized penitentiary official who examines the envelope, upon ascertaining that the envelope contains nothing in breach of security, is under a duty at law to maintain the confidentiality of the communication. Paragraph 7c. of Directive 219 underlines this point.

[117] In *R. v. Conway* (*Weatherall v. Canada (Attorney General)*), [1993] 2 S.C.R. 872, LaForest J. stated for the unanimous court at p. 877:

> Imprisonment necessarily entails surveillance, searching and scrutiny. A prison cell is expected to be exposed and to require observation. The frisk search, the count and the wind are all practices necessary in a penitentiary for the security of the institution, the public and indeed the prisoners themselves. A substantially reduced level of privacy is present in this setting and a prisoner thus cannot hold a reasonable expectation of privacy with respect to these practices. This conclusion is unaffected by the fact that the practices at times may be conducted by female guards. There being no reasonable expectation of privacy, s. 8 of the *Charter* is not called into play; nor is s. 7 implicated.

[118] *Halsbury's Laws of Canada* states at HAP-218:

> **Prison cells**. A significantly reduced degree of expectation of privacy arises in the context of prison cells, with respect to cell searches, body searches, shoe treads and surveillance of prisoners. Such a low degree of any expectation of privacy is required to ensure the safety and security of the institution, its employees and the prisoners. A Charter right is only likely to arise in order to limit rules that give the institution an absolute unfettered right to invade the privacy interests of inmates where there are no clear guidelines or standards on the matter in issue.

[119] In *R. v. Lamirande*, 2002 MBCA 41, Scott C.J.M. stated for the court at paras. 29-31:

> **29** Here the nature of the relationship between the parties (jail keeper and accused), the place where the information was obtained (prison), the manner in which it was obtained (a search upon admission), and the seriousness of the crime

> (manslaughter), form the critical context in which the right to privacy needs to be assessed.
>
> **30** In the leading case of *Weatherall* earlier referred to, the place where the information was obtained was a critical factor in the court's conclusion that prisoners have a decreased expectation of privacy.
>
> **31** In my opinion, the trial judge was undoubtedly correct in his conclusion that there was no expectation of privacy given the inherent nature of a prison facility and the documents themselves. The many cases since *Weatherall* that have considered the question of the nature and extent of the reasonable expectation of privacy in a custodial environment support this conclusion.

[120] Even if Leggette had a subjective expectation of privacy due to his lack of experience in prison, that does not equate to a s. 8 violation. In this case prison officials at the Burnside Jail were perfectly justified in their initial search of Leggette's cell. A four to six-inch piece of a wooden mop handle was noted to be broken off and missing earlier that day in the West Unit. A mop handle could quickly be converted into a weapon, known as a "shank". That was the genesis of the search of all cells in the West Unit, including Leggette's.

[121] During the course of the general search of Leggette's cell, Lucas found a cylindrical tube of the same size and shape as the missing broom handle on his shelf. Lucas had the authority to look inside the tube. Although she did not see the broom handle, Lucas fanned through the writings looking for other possible contraband. As MacInnes J. stated in *R. v. Sutherland*, [1997] M.J. No. 390 (Q.B.):

> **9** The law is clear that an incarcerated prisoner has a substantially reduced expectation of privacy. And for good and obvious reasons. Here, the accused, having received the Handbook and having experience as a prisoner, including at the subject institution, knew or obviously should have known that frequent searches could and did occur and that when conducting a cell search prison authorities could and would look for contraband. That would include going through books or other documents to ascertain whether contraband such as razor blades, drugs or the like, might be contained within them. The practices followed at the institution, including the search for contraband, were not only known or obvious to the accused, but were reasonable and justifiable practices in the circumstances.

[122] Prison contraband could include razor blades and other small sharp objects or drugs hidden between pages or writings. While fanning through the writings, Lucas noted a word that jumped out at her. According to her testimony on the *voir dire* the word was "weapon". According to Iutzi, Lucas told him that she had seen

the word "weapon" or "shank". Although the word weapon is not found in the 35 pages of writings, at page 14 of VD-1 the word "shank" is written by Leggette.

[123] According to s. 62 of the *Act*, a more focused search can be conducted "where an authorized person suspects, on reasonable grounds, that a person or property referred to in subsection 61(2) is carrying or contains, as the case may be, contraband or evidence relating to the commission of a offence or the contravention of a rule". Once Lucas noted the word "shank" (which is a "weapon") in the writings, while actually conducting a general search for a shank, how could the guards, entrusted with the security of all persons within the institution, not conduct a more detailed search of the writings? I find the search properly advanced from a s. 61 general search to a more focused s. 62 search.

[124] Once this advancement to a s. 62 search occurred, Iutzi had the authority to review the 35 pages of writings in more detail. Iutzi inferred that he had no inclination that these writings might be protected by solicitor-client privilege. There is absolutely nothing in VD-1 that would suggest the writings were prepared for a lawyer because they were not intended for a lawyer. Iutzi's claim that when reviewing VD-1 he had no inkling he could be looking at solicitor-client privileged information is credible based on the writings themselves. If VD-1 had been solicitor-client privileged information, this would not have prevented Iutzi from opening the tube and inspecting its contents. However, in keeping with s. 65 of the *Act*, Iutzi would have been required to open the tube in the presence of Leggette.

[125] Once Iutzi scanned the documents and identified the word "shank" he then located a number of other passages relating to institutional safety. This caused Iutzi to read VD-1 in more detail and he identified it as also containing evidence of a crime committed outside the institution. The writings were turned over to the Halifax Regional Police Major Crime Unit.

[126] Even if Leggette actually had a subjective expectation of privacy regarding the writings in the tubes due to his lack of prison experience (and I am not convinced that he did), objectively there was no reasonable expectation of privacy. The search was completely reasonable. Similar to the decision of Rosenberg J.A. in *R. v. Major* (2004), O.A.C. 159, there is no s. 8 violation in these circumstances.

[127] The defence also argues that Leggette's s. 7 and s. 11(d) *Charter* rights were violated. Specifically, the defence relies on the case of *R. v. Morris, supra*. In *Morris*, the facts differed greatly from those in Leggette's case, and are summarized at p. 2 of that decision:

The accused John Eric Morris had a relationship with the complainant Mary Jane Harkins which began in April 1989 and ended in approximately September, 1990 when the accused was charged with one count of assault causing bodily harm contrary to s. 267(1)(b) of the *Criminal Code*. He pled guilty to this charge and was sentenced in November 1990.

In December, 1990 the complainant contacted the Bedford Police Department and eventually in March, 1991 she provided them with an eight hour taped statement which was subsequently transcribed and analyzed. The result of this analysis was the laying of forty charges against the accused on May 10, 1991. These charges included common assault, assault causing bodily harm, aggravated assault, unlawful confinement and sexual assault.

On the day the charges were laid the police also obtained warrants to search the accused's residence and his motor vehicle. One of the items to be searched for was listed in Schedule A of the warrant as No. 8 – "Writings of John Morris addressed to his lawyer relating to Mary Jane Harkins."

The warrants were executed on May 10, 1991 and located in the accused's bedroom the police found a file marked 'Placement Active' which contained handwritten and typed notes relating to the accused's relationship with the complainant as well as correspondence to the accused from the law firm of Boyne Clarke.

On May 13, 1991 counsel for the accused wrote to the Crown and advised them that he was asserting a claim of privilege with respect to the contents of the file seized and entitled 'Placement Active'. In his letter counsel for the accused also requested that the police return the file immediately or in the alternative that they seal the documents seized and keep them apart until such time as the issue of the police entitlement to possess these documents allegedly covered by solicitor-client privilege was resolved by a court.

On June 4, 1991 the Crown responded to this letter by saying that the police did seize a file of correspondence between the accused and his lawyer and that the police had been advised of the solicitor-client privilege involved.

On June 7, 1991 counsel for the accused wrote to the Crown requesting that the materials covered by the assertion of privilege be returned and that an undertaking be given that none of the contents of the seized file be copied. He further requested a prompt reply to his request so that if the police were not going to comply with this request he could then take appropriate steps to obtain compliance.

On July 3, 1991 correspondence on the law firm's letterhead found in the file entitled 'Placement Active' was returned to counsel for the accused but the rest of the file was kept by the police.

[128] Cacchione J. detailed further facts in *Morris*, at p. 3:

> The evidence taken on the *voir dire* discloses that on August 25, 1990 the accused advised the complainant that he had retained counsel and that he intended to meet with counsel. Later on in September, 1990 the accused told the complainant that he had written 25 to 30 pages of notes for his lawyer dealing with the issue of consent and with the complainant saying one thing one time and another thing the next time. The evidence also indicates that the complainant went to the police for the first time on September 21, 1990 in relation to the assault causing bodily harm which occurred on September 19, 1990.
>
> It has been established through the evidence of both the complainant and the accused that the accused had consulted with counsel prior to being charged with the September 1990 offence. This first consultation with counsel occurred during the latter part of August, 1990 when the accused spoke to Cyril Randall, a lawyer he knew, who then referred him to Sandra MacPherson. The accused was from there referred to his present counsel and met with him sometime near the end of August, 1990.
>
> These consultations were for the purpose of seeking legal advice about an incident which had occurred between the accused and the complainant during the latter part of August, 1990 and also with respect to other specific incidents which had occurred during the course of their entire relationship.
>
> The evidence further discloses that the accused prepared certain writings about his relationship with the complainant. These writings were detailed and intended to provide information about the relationship and specific information about certain incidents occurring during that relationship. Some of these writings refer directly to incidents which are the subject matter of charges before this court. Other writings deal with the complainant's credibility, her behaviour, and the accused's interpretation of certain events.
>
> The accused testified that many of these writings were prepared for his consultations with counsel and that they were reviewed by his counsel and then returned to him. Although the writings are not dated, addressed or signed, it is clear from reading them that some are directly linked to the charge of assault causing bodily harm laid in September, 1990 and others relate to the complainant's credibility and the accused's interpretation of events occurring during their relationship. In fact one of these documents is entitled 'Background to Assault Charge'.
>
> The evidence before this court is that these writings were prepared with a view to obtaining legal advice about the implications of the accused's relationship with the complainant. The accused testified that these materials were intended to be confidential communication with his counsel and that they were prepared with the view to seeking legal advice about his past behaviour with the complainant.

> Another issue to be determined in respect of these writings is whether the privilege which attaches to communications prepared for counsel with a view to obtaining legal advice is lost once a person other than a solicitor is made aware of their existence. Specific reference was made by the complainant to a document of 25 or 30 pages in length which the accused told her about. The complainant testified that she never read this document nor did she see it. She was only made aware of this document because the accused told her that he had prepared a document for his lawyer that dealt with the issue of consent and also with her saying one thing one day and a different thing the next day. The comments made to the complainant by the accused were more in terms of generalities rather than specifics.

[129] In the case at bar, unlike *Morris*, the documents do not contain solicitor-client privileged information. The cellmates were both interested in a "book deal". Leggette may not have wanted prison officials and police to see various drafts he had created for a book but that does not equate to a forced confession or a breach of his right to silence. Leggette testified that he often has to write things down more than once to get things right. I think this was an inadvertent reference to VD-1 being a rough draft of VD-5. I have heard no evidence on this *voir dire* that Kory was either a police officer or an agent acting for the police. Kory was simply a long time convict who saw an opportunity to gain notoriety, and possibly earn money through book sales, by having Leggette provide him with information about the Loretta Saunders homicide. Leggette created VD-1 either as a rough draft for Kory's book or for his own future book or both. This is not remotely analogous to the situation in *Morris*, where Cacchione J. stated at p. 8 regarding the s. 7 violation:

> It is quite clear that these privileged documents were reviewed by the police and the Crown. In fact the police prepared Crown briefs respecting the various charges and an exhibit index which they cross-referenced to the particular documents which had been seized. The exhibit index has key notes taken from the seized documents cross-referenced to various Crown briefs dealing with the charges presently before this court. According to the investigator these documents would be quite helpful to the Crown in dealing with any defence put forth by the accused.
>
> Section 7 of the *Canadian Charter of Rights and Freedoms* states:
>
> 7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> In *Broyles v. The Queen* (1991), 68 C.C.C. (3d) 308, the Supreme Court of Canada held that s. 7 of the *Charter* includes a right to silence which includes the

right to choose whether or not to make a statement to the authorities. In *R. v. Hebert* (1990), 57 C.C.C. (3d) 1 (S.C.C.), McLachlin J. described this right at p. 43 by commenting that:

> The essence of the right to silence is that the suspect be given a choice; the right is quite simply the freedom to choose - the freedom to speak to the authorities on the one hand, and the freedom to refuse to make a statement to them on the other.

It should be remembered that the purpose of the right to silence is to limit the use of the coercive power of the state to force an individual to incriminate himself or herself; it is not to prevent individuals from incriminating themselves per se: *Broyles v. The Queen*, *supra*.

The close connection between the right to counsel and the right to silence was a subject of comment by McLachlin J. in *R. v. Hebert*, *supra*. At p. 35 she states as follows:

> The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is his right to silence. The detained suspect, potentially at a disadvantage in relation to the informed and sophisticated powers at the disposal of the state, is entitled to rectify the disadvantage by speaking to legal counsel at the outset, so that he is aware of his right not to speak to the police and obtains appropriate advice with respect to the choice he faces. Read together, ss. 7 and 10(b) confirm the right to silence in s. 7 and shed light on its nature.

According to Justice Sopinka the right to silence is an integral element of our accusatorial and adversarial system of criminal justice. At p. 11 of *R. v. Hebert*, *supra* he states:

> It follows, it seems to me, that the basic principle underlying the right to remain silent must be a principle of fundamental justice within the meaning of s. 7 of the *Charter*. In other words, the right to remain silent is truly a right.

As can be seen from the decisions in *Broyles v. The Queen* and *R. v. Hebert*, the accused has the right to choose whether or not to make a statement to the authorities. In my view this right is violated when the police seize, review, and make use of documents that are clearly covered by solicitor-client privilege.

[130] Cacchione J. went on to add at p. 10 regarding the s. 11(d) violation:

> Turning now to the accused's right to counsel. It is clear that the *Charter* provides that an accused has the right to retain and instruct counsel upon detention or arrest.

In *R. v. Rowbotham et al.* (1988), 41 C.C.C. (3d) 1, at p. 66, the Ontario Court of Appeal, in a case dealing with the right of an indigent accused to counsel, stated:

> ...in cases not falling within provincial legal aid plans, ss. 7 and 11(d) of the *Charter*, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of an accused by counsel is essential to a fair trial. (Emphasis in original decision)

This decision was referred to with approval in *R. v. McGibbon* (1988), 45 C.C.C. (3d) 334, where the court, at p. 345, stated in reference to *Rowbotham*:

> This court adopted with approval earlier authorities that held that while the *Charter* does not in express terms guarantee the accused the right to counsel at trial, such right is to be inferred from the provisions of s. 7 guaranteeing the right not to be deprived of liberty except in accordance with the principles of fundamental justice and s. 11(d) guaranteeing a "fair and public" hearing.

In *R. v. Silvini* (1991), 68 C.C.C. (3d) 251, the Ontario Court of Appeal interpreted the right to counsel as meaning the right to effective counsel. It has also been recognized that inherent in this right is the right to instruct counsel in private. See *R. v. Playford* (1987), 40 C.C.C. (3d) 142 (Ont. C.A.), *R. v. LePage* (1986), 32 C.C.C. (3d) 171 (N.S.S.C.A.D.). In *R. v. Ringer* (1988), 85 N.S.R. (2d) 402, Macdonald J.A. described the right to counsel as perhaps being the single most important right guaranteed by the *Charter*. He also held that an accused's right to counsel was violated where the accused could not consult with his counsel in private.

In *Solosky v. The Queen*, *supra*, The Supreme Court of Canada described the right to communicate in confidence with a legal advisor as a fundamental civil and legal right, founded upon the unique relationship of solicitor and client.

Can it be said that in the present case the accused's right to consult with counsel in private has been respected? I do not think so. Most if not all of the contents of the accused's communications with his counsel about this case are in the hands of the Crown and the police and have been reviewed by them. It is as if the police were secretly listening to the client instruct counsel. The nature and complexity of this case where the accused faces some twenty seven separate charges requires that he have the assistance of counsel. It is essential that he be represented by effective counsel in order that he obtain a fair trial. The accused must be able to have his case presented fully and adequately so that he can make full answer in defence to the charges and thereby obtain a fair hearing.

> The right to make full answer in defence has been described as one of the pillars of criminal justice on which we rely to ensure that the innocent are not convicted: *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.). In *R. v. Williams* (1985), 18 C.C.C. (3d) 356 (Ont. C.A.) Martin J.A. stated at p. 371:
>
> > The right to make full answer in defence is one of the established principles encompassed in the term "fundamental justice" secured by s. 7 of the *Charter*. Obviously an accused precluded from making full answer and defence is denied a fair hearing: *Re Potma and The Queen* (1983), 41 O.R. (2d) 43, 2 C.C.C. (3d) 383, 144 D.L.R. (3d) 620 (Ont. C.A.).
> >
> > In *Re Potma and The Queen, supra*, Mr. Justice Robins, speaking for the Court, said at p. 52 O.R., pp. 391-2 C.C.C.:
> >
> > "Fundamental justice", like "natural justice" or "fair play", is a compendious expression intended to guarantee the basic right of citizens in a free and democratic society to a fair procedure. The principles or standards of fairness essential to the attainment of fundamental justice are in no sense static, and will continue as they have in the past to evolve and develop in response to society's changing perception of what is arbitrary, unfair or unjust.
>
> I am satisfied upon reviewing the authorities that the accused's right to consult with counsel in private, his right to effective counsel, his right to make full answer in defence, and his right to remain silent have all been infringed by the actions of the police and the Crown. The accused has been placed at an obvious disadvantage in that he must face an adversary who has full knowledge of the instructions he gave to his counsel. Clearly there has been a violation of both ss. 7 and 11(d) of the *Charter*.

[131] The search of Leggette's cell was reasonable. VD-1 was not written to obtain legal advice or to aid in litigation. There was no s. 7, s. 8 or s. 11(d) *Charter* violation in this case. Therefore, s. 24(2) is inapplicable. VD-1 is admitted as evidence on the trial proper.

[132] As an aside, none of the corrections staff who testified on this *voir dire* had a full or clear understanding of the need for protected communications between lawyers and their clients. Solicitor-client privileged documents do not merely include Crown disclosure and letters to inmates written on legal letterhead from lawyers. Inmates also have to write to their lawyers. It is trite to say that inmates do not have their own letterhead. Every inmate has to be able to communicate confidentially with their lawyer. Prisons house people charged with a broad spectrum of crimes and who may not have a clear appreciation about their legal rights, including solicitor-client privilege. The need for inmates to be able to comfortably and confidentially communicate with lawyers is fundamental to the

proper functioning of our Canadian criminal justice system. I would urge corrections officials to consider significantly increased training for all of their employees in this regard.

Arnold, J.