

CANADA / JUDGMENT

R. v. Kylo, Lubkey and Toupin

2003 BCSC 1926

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kylo, Lubkey and Toupin,

2003 BCSC 1926

Date: 20031219

Docket: CC980330

Registry: Vancouver

Her Majesty the Queen

Against

Steven Bradley Kylo

And

Lindsay Wayne Lubkey

And

Serge Toupin

Before: The Honourable Madam Justice Boyd

Reasons for Judgment

Counsel for the Crown:

A. Flanz

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R. Harris

Counsel for the Accused, Lubkey:

S. Buck

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D.M. Foster

Date and Place of Trial:

October 27-30, 2003

November 3-7, 2003

November 12-14, 2003

November 17-20, 2003

November 24-27, 2003

and December 2-4, 2003

Vancouver, B.C.

Introduction

- [1] The three accuseds, Bradley Kylo, Wayne Lubkey and Serge Toupin ("Kylo", "Lubkey" and "Toupin") have been charged with the robbery of Edward Chownick on December 5, 1994. Arising out of that same incident, the accused, Kylo, is also charged with the first degree murder of Chownick pursuant to s. 235 of the Criminal Code.
- [2] The victim, Edward Chownick, was an attendant at the Lions Lair, a video arcade in the 1000 block of Granville Street in Vancouver. He worked the night shift from 5:00 pm December 4th until 1:00 am December 5th. Chownick died as a result of 20-25 blunt force blows to the head using one or more weapons. He was found lying on the floor of the Employees Room with his hands taped behind his back. The tapes were applied before death. A cloth bag containing \$2,124 (mostly in bills) was found near his feet. Another canvas bag containing \$500 in rolled quarters was found in a wastebasket at the entry door to the arcade. Another canvas bag containing \$500 worth of rolled quarters was found beneath the front service counter. There is no evidence as to the precise amount stolen from the arcade.
- [3] The attack took place sometime after 1:00 am in the Employees Room at the rear of the arcade where the cleaning supplies were stored and the day's cache of money was to be hidden behind the radiator. It is not clear whether Chownick was on his way to hiding the bag of money in the Employees Room (as was the routine) or whether he had already done so when the attack occurred.

- [4] The Crown's case depends very largely on the evidence of the key Crown witness, Jeffery Meier ("Meier"). He came forward and provided information to the police in January 1996, ultimately leading to the accuseds' arrests in November 1996.

Meier's Evidence:

- [5] Meier is presently 34 years of age. He was introduced to Brad Kylo by his friend Mark Bowen, when all three were fellow Grade 12 high school students at West Vancouver Secondary school. Following graduation in 1988, Meier moved to Campbell River and lived with his grandparents. On his return to the Lower Mainland in 1990, he resumed contact with Bowen and through him, resumed his relationship with Brad Kylo.
- [6] The group spent a good deal of time together playing video games in the Granville Mall arcades, including the Lions Lair in the 1000 Block of Granville Street. There Meier struck up a friendship with Tom Tessman ("Tessman") one of the attendants at the Lions' Lair. Through Tessman, Meier met Lubkey and Toupin, individuals who worked as close partners in a drug dealing operation throughout the Granville Mall area, focusing particularly on the arcades. Apart from their common interest in video game play, the group shared a common enthusiasm for drug consumption, particularly a mixture of marihuana and cocaine. While Kylo regularly smoked marihuana, his drug consumption was less frequent than that of Meier, Tessman, Lubkey and Toupin, all of whom consumed drugs both more regularly and heavily, including cocaine. At trial both Lubkey and Meier conceded that at the material time, they were addicts.
- [7] Meier testified that on at least five occasions during the period 1991-1994, he had heard Lubkey say he wanted to rob the Lions Lair. In the fall of 1994, Meier says that he ran into Lubkey and Toupin and learned that they were sleeping on the beach. He says they accepted his invitation to stay at least temporarily at the apartment he shared with Mike Renner on East 57th St.
- [8] Beginning in late October, Meier's mother left Vancouver on a six-week holiday and had made her West End apartment available to him. He says that since Lubkey and Toupin kept very late hours he found it difficult to sleep at his own apartment and be sufficiently rested for his 7:30 am start at work as a forklift operator on Mitchell Island. Thus he testified he spent most work nights during this period at his mother's apartment.
- [9] Approximately five days prior to the December 5th incident, he says Lubkey told him about a recently aborted plan to rob the Lions Lair. According to him, Lubkey said, "We were going to rob the Lions Lair but Brad Kylo chickened out". Since he understood a Korean attendant would be on duty at the arcade, Kylo apparently feared he might have some martial arts experience and backed out.

- [10] On the afternoon of December 4, 1994, he says that he watched a football game at the basement suite with Toupin, Lubkey and another friend. After the game, he says he drove Lubkey and Toupin downtown and then proceeded to his mother's apartment where he spent the night alone.
- [11] He said that on the morning of December 5th, he found three messages on the answering machine. The first two were from Lubkey. In the first message, he says Lubkey mentioned it was 12:45 am, that he wanted to know "what was up" and that he guessed he (Meier) was asleep. In the second message, he mentioned it was just after 1:00 am, again guessed aloud that Meier was sleep, and said that he would contact him the following day. He said the third message was a "strange call", "like 30 seconds of dead air followed by a voice which said, "Help". He was unable to tell if the voice was that of a male or female. He testified that he deleted the messages and drove to work.
- [12] He says he reported to work at 7:30 am but due to a malfunctioning of the starter on the forklift he operated his work came to a stop. Unable to do a full day's work he says he returned home to the East 57th Street apartment in the late morning. On arrival, he testified he found Lubkey and Toupin in their sleeping bags on the two couches in the living room. He said that they were either in the process of waking or had been woken by his entrance. Immediately on his arrival in the living room, he testified that Lubkey said, "We robbed the Lions Lair last night". He testified Lubkey then said he would visit Ed (Chownick) in hospital, to which Meier says he replied, "I hope he still has his faculties left".
- [13] He says Lubkey then described the robbery in some detail. Lubkey said he distracted Chownick while Brad Kylo slipped in and hid behind a video machine in the arcade. The plan he said was to "go in, knock him out and tape him up". He said that Toupin had a radio scanner and was standing on the opposite side of the street together with Travis Kylo who was "keeping six", that is keeping a lookout. At some point Lubkey mentioned that some money had been taken from Chownick's wallet.
- [14] According to Meier, Lubkey said they flagged down a taxicab since they had no means of transporting the money from the scene. At this point Meier testified Toupin, who had been present throughout, participated in the conversation, and remarked on the loud thump the coins had made as they were loaded into the rear trunk of the cab. He says Toupin explained they took a taxi to a gas station near the East 17th street apartment. There, he said they found a shopping cart into which they loaded the bags of coins. He said they rolled the cart through various back alleys to the East 17th Street address. He said Toupin remarked on how noisy the cart was as it was going down the alleyway.
- [15] Some time following his arrival at the apartment, Meier testified that his roommate, Mike Renner, appeared in the living room and announced that "someone had been shot at the arcade". Later, as Renner left the apartment, he says that the Kylos arrived. He says Brad Kylo said they had seen yellow police tape around the arcade. Meier testified that Lubkey told Brad Kylo "You fucking killed him man. You fucking killed him". He says Brad Kylo

responded, "It was his time". According to Meier, Brad Kylo explained that he had snuck behind a video machine while Lubkey had distracted Chownick. He said that when he went to knock out Ed with a "pipe filled with pennies" but that "Ed's sixth sense kicked in". Although he kept hitting him, he said that Chownick kept getting up. According to Meier, as he struck him, Kylo said he could see "chunks of Ed were coming out".

- [16] Meier testified Kylo said he had taken the money out of Ed's wallet but that he had left the wallet at the scene. Knowing that Chownick wore a lot of jewellery, Meier says he asked Kylo whether he had taken any of the jewellery and that Kylo responded he had not. Meier says he commented that by not taking his jewellery, it would look like the person who had killed Chownick knew him, since he would not want to be caught with his jewellery.
- [17] Due to the blood staining on Brad Kylo's shoes, Meier testified that a decision was made to dispose of the shoes and buy replacement footwear for Kylo. He says he drove the Kylos to Carleton Sports and Recreation, an outdoor store on Kingsway Street. He says that throughout the drive, Brad Kylo sat in the front passenger seat while Travis Kylo sat in the rear seat, directly behind him. He says that he was afraid for his own safety and fearful that Travis might stab him.
- [18] En route, he says that Brad Kylo was "pissed off" and complained that while Lubkey had told him Chownick would not put up a fight, he had in fact put up "a hell of a fight" and that there was "a lot of blood". He testified Kylo said that after the incident, he and Travis had returned to the Bosman's Motor Hotel where they were staying just blocks away from the Lions Lair, at 1060 Howe Street. Kylo told him that although he wanted to, he decided not to telephone an ambulance since he was afraid the police would track the call to the hotel. Later that morning, Kylo said he and Travis were "freaking out" when they saw police attending at the Bosman's Hotel and took steps to hide some bloody clothing behind an ice cooler at the hotel.
- [19] On arrival at Carleton Sports, he says they all entered the store together and that Brad Kylo bought a pair of gray and greenish coloured hiking boots using \$60-80 in cash. He said that at that time he (Meier) was still wearing his construction clothes.
- [20] On their return to the East 57th street apartment, he says that Brad Kylo's blood stained shoes or boots were put in a paper bag and that Lubkey announced he would get rid of them. He says he left the premises and returned 10-15 minutes later without the bag, advising that he had got rid of the boots near a construction place and "not to worry". He said that at that time, there was a construction site between Slocan and Kaslo Streets, to the east of the field near his basement suite.

- [21] At some point, he says Toupin advised that he had counted the money and had put half the money in separate bags--the Kyllos' half in Brad Kyllo's knapsack, and Lubkey's and Toupin's half in a black duffel bag. Although Meier heard no specific discussion, he deduced that they were disappointed in the amount of the proceeds from the robbery and "didn't get what they expected". The Kyllos left, announcing they would be returning to their parents' home in West Vancouver.
- [22] Following this date, Meier testified that from time to time Toupin would leave the apartment and ride on his mountain bike to the train track area north of the Grandview Highway, where he and Lubkey had told him they had hidden their portion of the money. He said Toupin would return with some money, usually about \$100 at a time, initially in loonies and later mostly in quarters. He said he saw Lubkey re-rolling the coins using sheets of magazine paper.
- [23] From time to time, he said that he would drive both Lubkey and Toupin to "cheque cashing places like Money Mart", where Toupin would go in carrying \$20-\$30 worth coins at a time, for cashing into bill form. Meier also testified that from time to time, he drove Lubkey to the home of Robert Dayton ("Dayton"), one of Lubkey's drug suppliers, where some of the coins were used to purchase drugs.
- [24] During the period between early December 1994 and late February 1995, Meier says that from time to time, whenever he and Lubkey and Toupin watched a murder mystery movie or some such movie and the topic of "rats" or informants arose, Lubkey would say "he would eliminate any liabilities they had", a comment which he took to be specifically directed towards him. Meier said that ever since he had learned of the events of December 4th he felt very uncomfortable. While he wished to distance himself from his roommates, he testified that he did not do so, believing that if he made a "hasty retreat" it would alert all of the accused and that there might be repercussions.
- [25] In late February 1995, Meier says his grandfather requested that he come over to Vancouver Island to help with the construction of a shop. He continued to pay the rent but left the basement suite apartment in Lubkey's and Toupin's possession while he moved to Campbell River for approximately a month. He returned to Vancouver in late March 1995 in order to move his possessions out of the basement suite and to ensure that Lubkey and Toupin also left the premises. He says the Kyllos picked him up at the ferry terminal. On this occasion, he says that Brad Kyllo complained that in light of the fact he had "done all the work", he had received an inadequate share of the proceeds of the robbery.
- [26] The next day the entire group participated in the move out of the basement suite. During the course of the move, he says Lubkey mentioned that the police had delivered a questionnaire to him in which they asked how much he (Lubkey) would be prepared to spend for Chownick's funeral. According to him, Lubkey said, "it's always interesting that when the police show up, you are never around. I know about Perkins Road (Meier's grandparents address in Campbell River) and I will blow your whole fucking family up." He considered the

remark a clear threat and an indication Lubkey believed he was an informant.

- [27] After they had all helped with the move, he says the Kyllos returned with him to his mother's apartment in the West End. There, Meier says that Brad Kyllo once again complained about the misinformation which Lubkey had given him - ie that Chownick could be expected not to put up a fight. He says Brad Kyllo expressed concern about the questionnaire the police had given to Lubkey and also about the manner in which Lubkey and Toupin had disposed of their proceeds. He also expressed concern that Lubkey, who is grossly obese, was in poor health, with a bleeding ulcer and a heart condition and that if Lubkey became ill, he would "squeal". Again, he says he complained about receiving an inadequate share of the proceeds.
- [28] Although the plan was for Meier and both Kyllos to return to Vancouver Island together, Meier says that Brad Kyllo remained behind, apparently intent on "keeping an eye" on Lubkey, whose relationship with Kyllo was deteriorating. Travis Kyllo however left with Meier and eventually settled for a period on Cortez Island while Meier says he worked in Campbell River.
- [29] At some point after returning to Vancouver Island, Meier says he learned through his friend Tom Tessman, that Lubkey was alleging he (Meier) had received the \$25,000 reward offered by the Vancouver Police Department for information on the murder-robbery. In April or May of 1995, Meier says that he telephoned Lubkey at the Austin Hotel in Vancouver and told him he was not a rat. He said Lubkey responded that "he knew what he had done" and rambled something about Meier having stolen some of Lubkey's possessions and drugs from the basement suite. Meier denied the allegations.
- [30] In December 1995, Meier joined his mother on her four-day business trip to Buffalo, New York, where she treated him (a devoted Miami Dolphins fan) to tickets to a Miami Dolphins game. While flying home together he says he told his mother generally about the murder-robbery and the fact that he was thinking of coming forward as an informant. She encouraged him to make contact with the police through a family friend, a member of the Vancouver Police Department who Meier had met during his high school years. He met with him in early January 1996, was immediately referred to the Major Crime Division and the following day (January 6, 1996) provided a sworn, videotaped statement (a KGB statement) to Detectives Pranzl and Aitken, the two investigators involved in the case.
- [31] After taking the statement from Meier, the two detectives asked him to lead them to the area where he believed the shoes or boots had been disposed of near the basement suite apartment. They walked the periphery of the nearby park area with him but found nothing. Since Meier did not know the name of the particular shop, they also asked him to lead them to the store where the new boots had been purchased. Later, relying on information concerning the nature of the item purchased, the value of the purchase and the approximate time of the purchase, the shop owner was able to produce a cash tape in which the transaction was recorded. Relying on Meier's statement that some of the money found its way to Mr. Dayton's to purchase drugs, the police approached Dayton and obtained a

statement from him confirming Lubkey's purchase of drugs using a great number of coins in December 1994. Finally, following the accused's arrests in November 1996, the police were able to obtain a blood sample from Bradley Kylo pursuant to a DNA warrant. Kylo's DNA and the DNA found in a piece of gum, on top of or resting on a money bag in the wastepaper basket adjacent to the exit door of the arcade, match.

- [32] Based on Meier's evidence, including his knowledge of certain information held back by the police as well as the various pieces of independent corroborating evidence (ie. Boots purchase; drug purchase from Dayton using large amounts of coinage; Brad Kylo's DNA in gum found resting on money bag in arcade waste basket), the Crown says it has proved the accused's guilt beyond a reasonable doubt.

Defence Position:

- [33] Both Lubkey and Brad Kylo testified at trial.
- [34] Lubkey's testimony was essentially that as a long time drug dealer on the Granville Mall, he had a close and friendly relationship with the owner and staff at the Lions Lair and would have no motive to rob the arcade. He described the arcade as "a second home". He regularly stashed drugs in the arcade and visited it to replenish his supply as the day's sales progressed. He often met his customers there and completed transactions on the premises. He said he was very friendly with the owner and the attendants and often assisted them, either unloading money for the machines on a Monday morning or dealing with unruly customers on the premises.
- [35] He says he was intimately familiar with the closing routine at the Lions Lair and was often invited, after closing hours, to remain behind and smoke drugs with those attendants who were friends. He knew where and how the money was counted and where the cash was stashed at the end of the night shift. He denied ever voicing a desire or a plan to rob the Lions Lair. He denied any involvement in the murder robbery. He denies making any of the alleged statements to Meier.
- [36] He says that he and Toupin were downtown on the night of December 4th, covering their regular drug-dealing route. He admits he was in the arcade but says he left at approximately 12:45-12:50 am. He says that he and Toupin carried on with their route along Granville and West on Davie Street and eventually caught the bus home at 3:00 am-3:15 am.
- [37] He admitted that his relationship with Meier deteriorated in late 1994 and early 1995. He says that in late 1994, he returned to the basement suite apartment and found the window ajar and some drugs stolen from the premises. He was aware of Meier's drug habit and his chronic complaints regarding a lack of funds. He says he confronted Meier and accused him of stealing the drugs but that Meier insisted he had been away on Vancouver Island and had just returned to Vancouver that morning. Lubkey said he had seen his truck downtown sometime earlier and concluded Meier was lying and was likely the thief.

- [38] He said Meier already owed him money arising from two earlier sales of vehicles. In early 1995, he says he learned that Meier had used one of his (Lubkey's) vehicles to perpetrate certain gas station robberies. Combined with his suspicion that Meier had stolen some drugs from him and had possibly suggested to police he was a suspect in the murder robbery (leading to the police directing the questionnaire to him in February), he says that their relationship deteriorated entirely by the early spring of that year.
- [39] Killo admits he was downtown, living at Bosman's hotel, from November 30th until the morning of December 5, 1994 as the hotel records verify. As I will note later, while he admits he was in the Lions Lair on the night of December 4th, he says he left at approximately 10:30 pm, and returned to the hotel where he spent the balance of the night alone. He denies any involvement in the murder-robbery. He denies attending Carleton's to purchase a pair of boots on December 5th. He denies making any of the alleged statements to Meier.
- [40] All of the accused have advanced the defence theory that it was likely Meier, acting with others, who participated in the murder robbery of the Lions Lair. This they say would explain Meier's knowledge of many of the details of the crime as well as the apparent errors made by someone not overly familiar with the workings of the arcade, who would therefore not have located or realized the presence of the money bag in the Employee's Room.

Meier as an unsavoury witness:

- [41] Central to an assessment of the Crown's case is an assessment of the credibility of Meier, whose evidence is the cornerstone of this prosecution. I have approached Meier's evidence with a good deal of caution since, by any measure, he must be characterized as an unsavoury witness.
- [42] In late 1987, just after he had turned 18 years old, he began to siphon gas from vehicles. He was charged, convicted in 1988 and ultimately received a conditional discharge with probation for one year.
- [43] Then beginning in late 1990 or early 1991, he began to engage in what he called "Pidgeon Park ripoffs". Posing as a potential purchaser, he would approach a drug dealer, ask to see his drug product, and then snatch the drugs and run. He said he committed as many as 20-25 of these thefts over a period of years.
- [44] I should note that Meier played football in high school. After graduation, and after returning to Vancouver, he joined the Vancouver Merilomas. He says that after returning to Vancouver he renewed his acquaintance with Mark Bowen and was introduced to marihuana. While he did not initially smoke regularly, he admitted that over time he began to smoke the drug on a daily basis. Eventually he was introduced to cocaine. Initially he snorted it but then settled into his favourite means of delivery--in marihuana joints laced or sprinkled with cocaine. He said much of the marihuana was supplied by Lubkey, although he would sometimes have to buy it. He insisted that he would not buy cocaine and that it would be supplied by Lubkey, in the special joints he rolled. While he underplayed his levels of consumption, I am satisfied

that he was a young man who was consuming a significant quantity of drugs, with the result that large periods of his life during this period were "out of control".

- [45] In 1991, he began to participate in a series of crimes with ever escalating levels of violence. In March 1991, in the course of applying for welfare benefits, he assaulted a social worker. (He was later convicted and fined \$300, with 14 days imprisonment in default and placed on probation for one year). In 1991 he committed the first of "a few" break-ins at the Vancouver Aquarium. That same year he engaged in various acts of random vandalism, driving around in neighbourhoods with a hockey stick and knocking off the side mirrors of vehicles parked in the street.
- [46] In 1991, he admitted that with others he broke into Dayton's home and robbed him of various items, including some drugs. Approximately a week later, he returned to Dayton's home with others, this time posing as a purchaser of drugs, with the intent of committing a home invasion. He eventually stormed the premises, tackled the person who allowed him entry and then entered Dayton's bedroom where Dayton was assaulted. Some quantity of marihuana and \$2800 in cash was stolen.
- [47] Later that same year, using an imitation gun, he committed two robberies of individuals leaving a casino on Broadway Street in Vancouver and committed an attempted robbery of a third individual, also leaving a casino in the downtown area.
- [48] In 1993, he experimented making maletov cocktails which he rolled under vehicles in the street. One vehicle caught fire, while a second vehicle escaped damage. That same year he gained possession of a handgun equipped with a silencer and fired it at a street sign from his vehicle, as he crossed over the Knight Street bridge. (At some point he gained possession of a Mini 14, a long barrelled semi automatic riffle, which he said he possessed until the first trial of this matter which commenced in late 1998.)
- [49] In 1993, he agreed to participate in a home invasion in Courtenay on Vancouver Island. Posing as police officers, he and others gained entry to the home for the purpose of collecting a drug debt. His role was to hold the victim's wife and seven-year-old child at gun point (using a Glock semi-automatic pistol) in a bedroom in the premises, while the victim was beaten in an adjacent room. Later he went to the basement with others to steal various firearms. He ultimately drove the getaway car and monitored any potential police presence using a radio scanner.
- [50] In early 1993, working with another person, he engaged in the smuggling of narcotics into a prison institution.
- [51] In early 1995, following the murder robbery at the Lions Lair, he admits that he was involved in two gas station robberies in Vancouver. During both robberies, he threatened the attendant with a knife. The first robbery was successful. However during the second robbery, the attendant responded to his threats by spraying him with mace. Meier responded in kind, spraying the attendant with mace and then fled.

- [52] In April 2001, he was involved in a road rage incident in Surrey, B.C. in which he fought with a fellow motorist.
- [53] Finally, overarching much of this period, he admits that beginning in 1990, he has from time to time engaged in ongoing welfare fraud, advising the Provincial Government authorities that he was unemployed and living at his mother's address, while actually living elsewhere and often working odd jobs. He admitted that from time to time he has also defrauded the Federal Government by failing to report taxable earnings in his income tax return or by collecting Unemployment insurance benefits while actually earning employment income.
- [54] When the police originally interviewed Meier in January 1996, he apprised them of his participation in the Courtenay home invasion, although he limited the description of his involvement to driving the getaway car. It was not until November of 1996, when the police specifically asked to interview him in connection with his past criminal activities, that he revealed some of his extensive criminal background to them. Although he well understood the importance of his testimony as the key Crown witness and the consequential need to make full disclosure, he nevertheless deliberately held back many of the details of his criminal history. In my view his lack of full disclosure stemmed from his own reluctance or inability to acknowledge the wide scope of his criminal activities, his fear that he might be charged with those criminal offences which he admitted and finally the likelihood that due to his heavy drug consumption, many of the criminal activities simply blurred together in his memory.
- [55] It is difficult for me to gain any clear sense of what forces drove Meier's criminal activity. He is a young man from a relatively comfortable background, with obvious family support from his mother and grandparents. He admitted that in some instances his temper had driven his behaviour although in other cases, he admitted that his actions were very much planned. Interestingly, he did not attribute his actions to being under the influence of either drugs or alcohol although he thought the cocaine might have contributed somewhat to his aggressive behaviour. My sense was that while he admits he was an addict during this period, he has little insight regarding the depth of his addiction. I believe that during much of the early to mid-1990's his addiction was a serious one and that his criminal actions during that period were those of an addict prepared to engage in increasingly desperate and violent behaviour, in order to feed that appetite.
- [56] It is significant that the Lions Lair murder robbery occurred during this very period, while Meier was living with Lubkey and Toupin, two very active drug dealers. Both Meier and Lubkey were addicts. Although Meier was working a regular job during this period, he admitted that he continued in his pattern of drug consumption, one which appears to have been very much dependent on the generosity of Lubkey's supply of drugs.

[57] It is in this context that I have instructed myself to consider Meier's evidence with a great deal of caution. Even as a trial judge sitting alone, I must consider the several factors which guide the Court in determining whether a self-instruction in the sense of a Vetovec warning ought to be considered. Those factors, which are set out in the Kaufman Report, are conveniently set out by the Supreme Court of Canada at ¶ 82 in *Regina v. Brooks* (141 CCC (3d) 321) and bear repetition here:

The Ministry has also adopted into its Policy Manual the Kaufman report's recommended list of factors to be considered in assessing an informer's reliability or lack thereof. The factors also serve as a useful guide to a trial judge when determining whether a Vetovec warning is necessary. The list is at pp. 607-9 and may be paraphrased as follows:

1. The extent to which the statement is confirmed by independent evidence;
2. The specificity of the alleged statement. For example, a claim that the accused said "I killed A.B." is easy to make but extremely difficult for any accused to disprove;
3. The extent to which the statement contains details and leads to the discovery of evidence known only to the perpetrator;
4. The degree of access that the in-custody informer has to sources of outside information (e.g. media reports, preliminary inquiry transcripts, etc.)
5. The informer's general character, which may be evidenced by his or her criminal record or other disreputable conduct;
6. Any request the informer has made for special benefits and any promises that may have been made;
7. Whether the informer has in the past given reliable information to the authorities;
8. Whether the informer has previously claimed to have received statements while in custody;
9. Whether the informer has previously testified in any court proceeding and the accuracy or reliability of that evidence, if known;
10. Whether the informer made some written or other record of the words allegedly spoken by the accused and, if so, whether the record was made contemporaneously with the alleged statement of the accused;
11. The circumstances under which the informer's report of the alleged statement was taken (i.e., how soon after it was made and to more than one officer, etc.);
12. The manner in which the report was taken by the police;
13. Any other known evidence that may attest or diminish the credibility of the informer, including the presence or absence of any relationship between the accused and the informer;

14. Any relevant information contained in any registry of informers."

[58] Almost all of the factors bear consideration here. Clearly, considering factor (5), Meier is a person of disreputable character. Notwithstanding that the Crown relies heavily on a body of independent evidence to corroborate his evidence-the first of the factors listed in the Kaufman Report. I intend to address at least the most significant corroborating evidence below:

(1) Boots purchased at Carleton's:

[59] The boots purchased at Carleton's following the murder-robbery are one of the key pieces of corroborating evidence relied on by the Crown. The Crown's position is that no one other than the perpetrator or someone close to the perpetrators could have known about this trip to Carleton's. Based on the evidence of Mr. Kenneth Green, the store proprietor, I am satisfied that a pair of Ridge Patriot hiking boots was indeed purchased by Meier or someone else in Meier's presence on December 5, 1994 at 1:36 p.m.

[60] While Kylo does not dispute that this purchase indeed took place as Meier describes, he testified that he never attended at this store to purchase such boots. His counsel has submitted that apart from Meier's evidence, there is no evidence that it was Brad Kylo who made the purchase. To the contrary, he suggests it was Meier and another who entered the store that day and made the purchase, thus explaining Meier's knowledge of the transaction.

[61] He relies on the evidence of Mr. Green who testified that while he initially could not recall the transaction after being told by police that the transaction of interest was the purchase of an item in the \$69.95 range, he thought the only possible item in that price range was a Ridge Patriot boot, which sold for \$78.95. The product was a sore point for Green -what he described as a "puppy" (ie. "dog" item), one of the very few items which has stuck out in his career as a poor inventory purchase on his part. He described it as a low quality product designed for discount stores which he had mistakenly believed might serve as an attractive lost leader in his store. Instead it proved to be almost impossible to sell in his high-end store and ultimately had to be sold off at cost.

[62] Once he narrowed his focus to the sale of a pair of Ridge boots, he was able to specifically recall selling such an item to a young man. The cash register tape ultimately confirmed the time of the sale, the price and the category of item--hiking footwear on December 5, 1994 at 1:36 pm.

[63] Apart from the notable sale of such an item, he also particularly recalled that the two young men involved stood out in terms of their scruffiness and poor hygiene. According to Green, they did not fit the profile of the store's typical customer--an outdoor fitness enthusiast dressed in "fleece and Patagonia and Gortex to the hilt". To the contrary, he recalled that both males wore scruffy, well worn, soiled clothes. Crouched at the customer's foot level, Green recalled the distinct body odour of the purchasing customer when he removed his damp, soiled socks to fit his boots. He described them both as Caucasian males in their late

20's, both standing approximately 5'10" in height. He could not recall any real differences in their builds. His best recollection was that the boot sold was in the larger range--that is size 10 or 11.

- [64] Green's description of the male who purchased the boots stands in stark contrast to Kylo's presentation. He was described by Meier and others as a particularly fastidious individual, always keen to groom and dress himself appropriately. Meier testified that when he entered Carleton's he was still in the work clothes which he had donned that morning to go to Mitchell Island. He says the clothes were likely dirty and soiled.
- [65] The evidence is that Brad Kylo is 5'9" in height in contrast to Meier's 6'1". In late 1994, Meier testified he (Meier) was a "rail" and that Kylo was much stockier than himself. Kylo testified that he wore size 8½-9 footwear. I should note that I have no evidence concerning Travis Kylo's height and weight.
- [66] While Meier insisted that all three of them (himself and both Kylos) entered the store, Green's evidence is that he dealt with two males and saw two males leave the store together.
- [67] The Crown has submitted that while I ought to accept Green's evidence so far as the time and date and general sale transaction are concerned, I should give no real weight to Green's description of the two customers. While I would not expect most witnesses to recall such details with any clarity, I am not persuaded to ignore or discount those portions of Green's evidence. As the owner of the premises, he was concerned to note the presence of two such unlikely customers in his store, for security reasons alone. Further, given the notability of the purchase of these boots and the unusual presentation of these atypical customers, he had an additional reasons to take particular note of these two customers.
- [68] On November 18, 1996, when the Kylos were arrested at their parents' home in West Vancouver, one of the attending police officers noted a pair of Ridge hiking boots and a pair of Honcho boots on the rear patio area near the door to the home. Kylo testified that the Honcho boots were his but denied ownership of the Ridge boots. There is no evidence before me concerning the size of the Ridge boots. No other evidence was called concerning the boots found at the Kylo home. That evidence of course raises the inference that a pair of Ridge boots may have been purchased by Travis Kylo at Carleton's on December 5, 1994.
- [69] Finally, I should note Brad Kylo's evidence that while he had been Meier's "casual friend", his brother Travis had become a much closer friend of Meier's throughout 1994. He testified that in early 1995 Meier and his brother Travis spent some time together on Cortez Island, a trip that he said he never planned to join in. Indeed Meier admitted that he and Travis had spent some time together on Cortez Island in early 1995.
- [70] In my view all of this evidence at least raises a reasonable doubt as to whether it was Brad Kylo who purchased the boots at Carleton's on December 5, 1994 or whether it was Meier in the company of some other individual, possibly Travis Kylo, who went to Carleton's to purchase the boots.

(2) Robert Dayton's evidence:

- [71] The Crown relies on Dayton's evidence to corroborate Meier's evidence that during the period following the murder-robbery Lubkey purchased drugs using a significant quantity of coins. While Dayton impressed me as an essentially honest, sincere witness, I nevertheless have some difficulty placing any great weight on his evidence. Dayton described his history and background at some length. He is a long-time drug dealer and drug addict. While he has apparently not consumed any drugs since late 1996, he very openly admitted that his memory is quite compromised. He has suffered a number of blows to his head and has been knocked unconscious on a few occasions. He has been hospitalized for drug overdoses and has undergone drug detoxification programs.
- [72] Based on Meier's statement in January 1996, the police approached Dayton on January 8, 1996 and told him they had reliable information to indicate that some of the proceeds from the murder robbery at the Lions Lair had come into his possession. Dayton testified that he was very reluctant to become involved in any way in the police investigation. He said that after considering the matter for a day he eventually relented and spoke to the police since they were very insistent and had pressured him to provide a statement, telling him that if he didn't cooperate, they would "shut down his business" and "throw him to the lions". He said these threats were made to him while he was "coming down" and suffering the effects of either heroin or cocaine withdrawal.
- [73] While I reject his evidence that the police ever threatened him with charges or threatened to shut down his drug dealing operation, I am satisfied Dayton, likely in a state of anxiety and/or drug withdrawal, perceived that if he did not cooperate, he faced a number of possible charges--possession of stolen property (related to acceptance of the coinage) and drug related offences (relating to his own drug dealing)--either of which might lead to the closure of his drug dealing business, leading, most significantly, to the termination of his own supply of drugs. Given Dayton's then frame of mind, I expect that from his standpoint, as a long-time dealer and addict, the police's approach was in itself a threatening event which raised any number of potential dangers.
- [74] As I noted earlier, while he is now a recovered addict, Dayton was very candid about the limits of his memory and his tendency to confuse events. In my view, Dayton's statement to police that the large flow of coins from Lubkey came to him in approximately December 1994 and January 1995 cannot be attributed much weight. His statement was made following some obvious assistance and coaching from police under what he perceived as police pressure. Further he described himself as being in withdrawal at the time.
- [75] Even accepting the statement on its face, it is of little probative value. Dayton agreed that throughout his approximate seven years of association as Lubkey's supplier of drugs, there were many occasions when Lubkey paid for his drugs using coinage. He was aware that Lubkey hung out in the arcades and not surprisingly, periodically used quantities of coins to make his purchases.

- [76] The Crown emphasizes Dayton's evidence that at some point in late 1994 and early 1995, the large flow of coinage from Lubkey even raised questions in Dayton's mind. Dayton testified that at one point during this period he asked Lubkey to explain all the coinage and that Lubkey responded "Don't ask". However, I note that under cross-examination, Dayton admitted that after the police interviewed him in January 1996, he spoke directly to Lubkey and told him the police had approached him. While his recollection of the discussion was somewhat vague, he testified that at that time he questioned Lubkey about where the coinage had come from and that Lubkey responded the coins had come from the customers to whom he had sold drugs. Given this witness' background and the admitted frailties of his memory, I cannot be confident that the discussion on which the Crown relies, which purportedly occurred in or about December 1994-January 1995, was not in fact the discussion which followed the police interview in January 1996.
- [77] In the end result, Dayton's evidence of the coinage he purportedly received from Lubkey in the winter of 1994-1995, cannot be characterized as reliable, independent evidence which corroborates Meier's evidence.
- (3) Gum found in wastebasket:
- [78] As evidence corroborating Brad Kylo's presence inside the arcade at the time of the murder-robbery, the Crown relies on the DNA evidence found in a wad of gum in a wastebasket just inside the entrance door to the arcade. A forensic analysis has confirmed that the DNA found in the gum matches Brad Kylo's DNA.
- [79] Brad Kylo testified that following a dispute with his father, he left the family home in West Vancouver with his younger brother Travis and checked into the Bosman's Hotel on November 30th. He says they checked out on December 2nd and then reconsidered the matter and checked in again on December 2nd. He says that Travis decided to return home after lunch on December 3rd but that he decided to remain downtown. He says that he renewed his booking and remained a guest at the hotel until he checked out on the morning of December 5th.
- [80] While he was living downtown he said that he followed a daily routine which included a late walk on the Stanley Park seawall, lunch and relaxation, and then attendance at the Granville Mall arcades, including the Lions Lair, beginning around 7:00 pm-8:00 pm.
- [81] He admits that he was in the Lions Lair arcade at approximately 10:00 pm on December 4, 1994. He says he left the Lions Lair at approximately 10:30 pm and crossed the street to talk to Lubkey and Toupin who were hanging out on the West side of Granville Street. (There is evidence from many sources that Lubkey and Toupin often stood at that location and others on the Mall, dealing drugs).
- [82] He says that he eventually returned alone to Bosman's, had a shower, ordered in a pizza from Panagopoulos Pizza between midnight or shortly after, and then went to sleep. He denies any involvement in the murder-robbery.

- [83] While he had no recollection of actually chewing gum in the Lions Lair on the night of December 4th, he accepts that the gum found in the wastebasket is his. He testified that since childhood he has suffered from asthma as well as a number of allergies, conditions which require the daily use of a variety of drugs, including prescription puffers and inhalers. In an attempt to counteract the resulting bad breath and dry mouth, he regularly chews gum. He conceded that the DNA found in the gum was his and he suggested that in all likelihood, he had been chewing gum in the arcade and had disposed of it, either in an ashtray near one of the video machines or in one of the wastebaskets.
- [84] Since there was no issue that Kylo was in the arcade that night, nor any issue concerning the fact the gum was his, the evidence concerning the precise location of the gum was the focus of considerable attention at trial.
- [85] Two patrol police officers were dispatched to the scene shortly after 9:00 am on December 5, 1994. Within 10 minutes of their arrival, at least one officer took note of a burlap or canvas sack in the wastebasket by the entry door. (The canvas bag was ultimately found to hold \$500 worth of quarters in 50 rolls). At that point, no one took note of the wad of gum. The Major Crime unit detectives, Detectives Aitken and Pranzl, arrived at approximately 9:35 am. Neither of them was able to specify the time the gum was discovered. Constable Crocker of the Identification Squad testified that the gum was discovered within the first 1-2 hours after his arrival at 9:30 am. His evidence conflicts to some degree with that of the second Identification Squad officer, Constable Phillips, who testified that the police only became aware of the gum at approximately 2:00 pm, well after he had finished videotaping the interior of the arcade at approximately 12:15 pm.
- [86] In any case, relying on this evidence, I am satisfied that at some point late after the police's arrival in the arcade, one of the officers' attention was drawn to the wad of gum in the wastebasket. An inquiry was made as to whether any of the police on the scene had been chewing gum and since no one responded affirmatively, steps were then taken to focus on the gum. Constable Crocker of the Identification Squad took photographs of the item while Constable Phillips actually removed the gum from the wastebasket, placed it in a cardboard exhibit box, and turned it over to Detective Pranzl for safekeeping and DNA analysis.
- [87] While Detective Aitken testified that the gum was sitting on top of the money bag but resting against the plastic liner bag, I am unable to place much weight on his evidence. He conceded that he spent less than a minute examining the gum's position and made no notes of his observations in his notebook. He effectively deferred to Constable Phillips, the Identification Squad officer who focused his energy on photographing the item in position in the wastebasket.
- [88] Detective Pranzl provided some better perspective of the position of the canvas bag and gum in the wastebasket itself. The wastebasket stands approximately 2'6" in height. He said that there was some trash at the bottom of the wastebasket and that a cream coloured canvas bag was sitting on top of that trash, near the bottom of the wastebasket, with some 6-8 inches of

space above the bag. He said the bag was leaning up against the inside of the wastebasket and that at the juncture where the canvas bag rested against the side of the wastebasket, there was "a crevice or a junction" where the gum rested. He thought that if the canvas bag was moved, the gum would fall. From his point of view, the gum was "definitely on top of the bag, but resting against the side of the container."

- [89] While Constable Crocker photographed the gum, he was unable to offer much in the way of definitive evidence interpreting those photographs. He admitted that the gray speckles which appeared to be both on the gum and the garbage bag liner, (the blow-up of photograph 35, Exhibit 1) might well be cigarette ash, but he was not certain. While he agreed that a portion of the gum appeared to be possibly hidden or flattened beneath a fold of the plastic liner, he preferred to describe the gum as "resting" on the liner. He agreed that one's view of the position of the gum very much depended on one's interpretation of the photograph.
- [90] Perhaps the most definitive evidence was offered by Constable Phillips, the second member of the Identification Squad who was in charge of videotaping, but then called on Constable Crocker to photograph the gum. While he did not photograph the gum, Constable Phillips did remove the gum from the wastebasket and for this reason, he appears to have focused more specifically on the positioning of the gum than other officers.
- [91] His best recollection is that when he removed the gum "it was barely lodged in position". He said the gum was not hard but was "still reasonably supple". He said that it "was precariously positioned beside the canvas bag, just on the shoulder of it and against the bin liner". He said it was not sticky against the gloves he was wearing and did not catch against the gloves or need to be pried off. He said the gum "was just delicately against the liner and not attached in any way." He described the gum as "nestled between a couple of folds of the black plastic liner". He conceded that Exhibit 4 (the blow-up of photograph 35) appeared to indicate a fold in the plastic liner which may well have been supporting some portion of the gum.
- [92] While he agreed with defence counsel's suggestion that the gum was not on top of the canvas bag but resting between the canvas bag and the plastic liner, he nevertheless held fast to his theory the gum must have gone into the wastebasket after the canvas bag had been thrown in. He described as "improbable" the defence theory that sometime earlier the gum had been thrown into the wastebasket and had adhered to the side of the liner, only to be knocked off and down when the canvas money bag was later thrown in to the wastebasket as the assailant(s) left the arcade.
- [93] As I understand his evidence, the improbability of the defence theory rests on his assessment of the condition of the gum. While he did not examine the bag liner with any kind of visual aid, he was satisfied based on his visual observations alone that there was no gum residue of any kind on the plastic liner. Further, he was satisfied that in any event, if the gum been thrown into the wastebasket, prior to the canvas bag, it would not have adhered to the side of the bag. In his view, the gum was "not that sticky" and accordingly, this scenario

was not a probable one.

- [94] While I respect Constable Phillips' assessment of the evidence, I am unable to place any great weight on the theory he has offered the Court. He very reluctantly admitted on cross-examination at the Preliminary Inquiry that this defence theory of how the gum came to rest in its final position was as equally probable as his own more Crown-oriented theory. At the trial of Travis Kylo he had also agreed with the second defence theory that the mere tossing of the heavy canvas money bag into the wastebasket, without actually hitting the gum, would have created sufficient tension to cause any gum stuck to the liner to fall to its final resting position.
- [95] At trial he would not accede to the suggestion the Crown and defence theories were equally plausible--a position which essentially rests on his view that the gum would not have initially adhered to the side of the liner. My impression is that this opinion was reached based on his assessment of the stickiness (or lack of stickiness) of the gum when he removed it from the wastebasket near 2:00 pm on December 5th. There is no evidence however of what the state of the gum would have been several hours, or a half day or even a day earlier. There is no evidence of the type of gum in question, how long it had been chewed and what its adherence qualities would or would not have been some hours earlier. I note Detective Pranzl's own evidence that when he took possession of the gum from Constable Phillips, he (Pranzl) noted that contrary to the two pieces of dry, hard gum now in the exhibit box, he was presented with a "plumper, juicier" piece of gum in one piece. While Pranzl never commented in any way on the "stickiness" of the gum, his evidence at least raises the possibility that the gum retained that quality.
- [96] Finally, the speckles of what appear to be cigarette ash on the bin liner and on the gum itself are significant. (Constable Phillips testified that he believed the white flecking evident on the liner, as shown in the videotape, was cigarette ash. Constable Crocker also agreed the specks might be ash). Lubkey, who spent a good deal of time in the arcade, testified that in most cases, the garbage cans in the arcade were emptied by the morning shift attendant who arrived at 9:00 am. He said there were cigarette trays and some cigarette stands throughout the arcade, so that customers could smoke and butt cigarettes while they played. His evidence concerning the disposal of the garbage was corroborated by Mr. Sun Yoon, the attendant who was working at the arcade during this period and who worked the day shift before Mr. Chownick went on duty at 5:00 pm on December 4th. He testified that if there were four wastebaskets in the arcade and that if a number of the bins were only half-full of garbage, the attendant on the morning shift would empty the litter from those bins into a single bin and then dispose of a single bag of garbage.
- [97] The cigarette ash on the side of the liner in question suggests that at some point, one or more ashtrays were emptied into the wastebasket at the entry. This evidence gives rise to several different theories of how and when the gum found its way into the wastebasket at the front entry of the arcade. On this evidence, it is possible the gum (initially disposed of in an ashtray) found its way into the wastebasket sometime after a morning attendant threw it

there after 9:00 am on December 4th. It may be possible the gum was thrown in even earlier and adhered to the side of the front door wastebasket when the contents of that bin may have been emptied out into another bag prior to December 4th. In this regard, it is significant that Kylo has admitted being in the arcade on several different days, beginning on November 30th and going forward to the night of December 4th. In effect, there is a wide window of time within which the gum may have found its way into the wastebasket.

- [98] Detective Aitken testified that the canvas money bag, found in the wastebasket, was filled with \$500 worth of rolled quarters and weighed 22 lbs. In my view, it is not improbable that when such a bag was thrown into the wastebasket, it might well have created an immediate stretching or tension of the bin liner bag surface, sufficient to dislodge any gum resting or adhering to the side of the bin liner. Likewise, the heavy canvas bag could easily have dislodged a piece of gum resting or sticking to the side of the bin liner, if it grazed the gum in the course of its trajectory.
- [99] In the end result, I find that neither the presence of the gum, nor its position in the wastebasket, results in any definitive proof of Brad Kylo's culpability. In my view the gum does no more than prove Kylo was present in the arcade at some point prior to the murder in the early morning hours of December 5th, a fact which he has readily admitted.

Jeff Meier's evidence:

- [100] As I mentioned at the outset, Jeff' Meier's credibility is central to the Crown's case. I acknowledge that Meier's role as a witness in this case was a difficult one. Prior to this trial, he had provided the sworn KGB statement to the police in January 1996; he had testified at the Preliminary Inquiry in September 1997; he had testified before a jury at the first trial in December 1998-January 1999; and he had testified again before a judge alone in the trial of Travis Kylo in February 2000. All told, he had already testified for a period of approximately 21 days prior to giving evidence in the trial at bar. Given the effluxion of time and the breadth and details of his testimony, I would expect that the evidence of any witness in similar circumstances would contain a number of errors and inconsistencies.
- [101] This was indeed the case here. However I would go further and note that quite apart from the confused jumbling of his evidence concerning the time of his arrival home from work on December 5th, and the relative arrival times of his roommate Renner and the Kylo brothers, after learning at the Preliminary Inquiry of the time of the transaction recorded on the Carleton's cash register tape, Meirer clearly tailored his evidence to provide for a much earlier arrival time home on his part.
- [102] While I will not repeat all of the various "mistakes" made throughout his testimony, I will simply note that in many cases, Meier appears to have omitted telling the police of significant items of evidence when he was interviewed in January 1996--the telephone calls made by Lubkey in the early morning hours of December 5th; the fact that Lubkey had separated the blood-stained boots and hidden them in different locations; the specific locations of the Money Marts where the money was disposed of by Lubkey and Toupin; his

fear of being stabbed by Travis Kylo as he drove the Kylo brothers to the Carletons Sports store; and Brad Kylo's statement en route that Chownick "had put up a hell of a fight". Neither in his statement to police nor even at the Preliminary Inquiry did he mention Brad Kylo's response to Lubkey's accusation that he had killed Chownick--"It was his time " Indeed, at the Preliminary Inquiry he testified Brad Kylo did not respond to that accusation.

- [103] As I understood his explanation of the inconsistencies, Meirer said that over time, his memory has simply become better. While he admits that he has been a heavy drug user and that his memory has indeed been clouded by the effects of his drug consumption, he was unwilling to accept the suggestion that such an improvement in his memory was unlikely. While I accept that his overall mental functioning has improved since he stopped consuming drugs, I do not accept that the memories created and compromised by drug consumption during that earlier period, can be restored or improved with the passage of time.
- [104] Finally, quite apart from the inconsistencies and the amplification of his evidence over time, I am troubled that even on his own evidence, much of Meier's narrative seems to make little sense. For example, he insists he wished to distance himself from the assailants and the "blood money" stolen from the Lions Lair, yet he allows the money to be counted in his apartment and even repeatedly drives Lubkey and/or Toupin to various Money Marts to cash in the coinage or to Mr. Dayton's to buy drugs with the money. He shares in consuming some of the drugs purchased with the money. He claims to be fearful of the Kylos and even expecting to be stabbed by Travis Kylo en route to Carletons, yet he later attempts to find jobs for both Kylos on Vancouver Island, travels to Cortez Island with Travis, and says he is later assisted by them in moving out of the East 17th street residence. He claims to have a good relationship to Chownick (a fellow Miami Dolphins fan) and a brother-like relationship with Tom Tessman--both attendants at the Lions Lair--but he admits taking no steps to anonymously tip the police or otherwise warn either of them of Lubkey's plans to rob the arcade, a robbery which he expects will involve some level of violence.
- [105] His narrative of the discussion with Lubkey and Toupin on the morning of December 5th is a stilted conversation, the contents of which seem unlikely. On hearing Lubkey blurt out his admission of the robbery and that he intended to visit the victim (Meier's friend) in hospital, there is not even the most superficial inquiry made by Meier about what happened or even what proceeds were stolen. He simply voices the hope that Chownick "has not lost his faculties" and directs his questions to the possible error in not removing Chownick's jewellery.

- [106] Even Meier's reasons for going to the police are peculiar. In his KGB statement, at the preliminary inquiry and at the first trial, he said that he decided to come forward and give a statement to the police since he believed that by sticking up for a fellow Dolphins fan he might change or improve the team's chances of winning at the Super Bowl. It was not until the Travis Kylo trial that he offered he went to the police in order to "do the right thing".
- [107] At the trial at bar, he said that the dynamics in the group had deteriorated by late 1995. He said he had been estranged from Lubkey and Toupin since March 1995 but denied stealing Lubkey's drugs. In late December 1995, he said he tried to call Brad Kylo on a few occasions but that Kylo never returned his calls. He said he took this as a "strong indicator" that by then, the entire group had turned against him. At trial he testified that he was not concerned they would go to police, but rather was concerned that the group would kill him. Two weeks later, in early January 1996, he approached the police and gave his KGB statement.
- [108] It is difficult to make any finding as to what motivated Meier becoming an informant. The defence theory that Meier's statement constituted a pre-emptive strike, before the group exposed him, is not however out of the realm of possibility.
- [109] I take little comfort in the fact that Meier was aware of the various details of evidence held back by the police, which the Crown says Meier could only know of by virtue of gaining such information from the perpetrators. The severity of the assault, the fact there was a lot of blood at the scene, the fact that the plan included taping up the victim, the fact that the victim's wallet was found at the scene and apart from his body, and the fact that the victim's jewellery were not removed during the robbery--are all information which Meier could have learned about by participating in the robbery.
- [110] Finally, I have not considered Meier's knowledge of the police attendance at Bosman's Hotel on the morning of December 5th, to necessarily corroborate Meier's allegation of Kylo's statement that on seeing the police, he panicked and hid the blood-stained clothing. There is no evidence that such clothing was ever found by the hotel staff in December 1994 or by the police, months later. Further, Meier's own car route to work that morning could easily have been along Nelson Street (the most direct route from his mother's West End apartment), offering him an opportunity to see the police vehicle in front of Bosman's.

Conclusion:

- [111] I have considered all of the evidence at length. While the principle of proof beyond a reasonable doubt does not apply to each individual piece of evidence, it does apply in a consideration of the credibility of the witnesses and the evidence as a whole. While Kylo did not strike me as a particularly credible witness, Lubkey did perform well and he appeared to provide his evidence in a straightforward, non-evasive manner.

[112] While Meier generally performed well as a witness, I am nevertheless not confident that his evidence, filled as it is with inconsistencies, additions and some tailoring, is necessarily reliable. On an assessment of the whole of the evidence, including Meier's evidence, and bolstered by the independent evidence (which has some limitations), I have concluded that the Crown has not proved its case beyond a reasonable doubt against any of the accused.

[113] In the result, I acquit each of the accused of each of the counts.

"M.E. Boyd, J."

The Honourable Madam Justice M.E. Boyd

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