

The Mr. Big Sting In Canada

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Abstract

For approximately the last fifteen years, the Royal Canadian Mounted Police have been mounting highly sophisticated undercover sting operations in Canada known colloquially as Mr. Big stings. These undercover operations involve multiple officers posing as members of a ruthless, powerful and wealthy criminal organization in order to trick suspects into making confessions to serious crimes, nearly always homicides. The undercover officers essentially orchestrate a chance meeting with the suspect, known operationally as the “target”, and exert their considerable influence and resources to convince him that he is being inducted into a criminal gang. The target is typically a person suspected of having committed a murder in the past, but who has never been charged due to lack of evidence.

Over a period of months or weeks the undercover officers attempt to build a relationship with the target based on fear, greed, companionship, or a combination of those or other emotions. The target is given tasks to perform which appear criminal in nature, but which are actually staged crimes in which every participant is an undercover officer. The target is eventually told he must meet with the boss of the gang, the “Mr. Big” after whom the sting is named, in order for a final decision to be made on whether or not the target can join the gang. The target is told that he must confess to the previous murder of which he is suspected in order to join the gang. Sometimes the target confesses readily, other times he protests his innocence, but Mr. Big will not accept exculpatory statements. Often further inducements are offered by Mr. Big, most notably a promise to derail the investigation by using his influence over corrupt justice system participants. If the suspect admits culpability he will be charged with the crime and nearly always convicted at trial.

Canadian courts have exercised virtually no control over police tactics in these cases. Defence counsel have argued against the use of the evidence on the basis of a breach of the *Charter of Rights and Freedoms* with regard to the right to silence and also with regard to abuse of process. These arguments have been unsuccessful. Defence counsel have also argued unsuccessfully that the statements should be inadmissible under Canadian hearsay law. It has also been argued, equally unsuccessfully, that the undercover operators should be treated as persons-in-authority, and hence that the statements elicited from the targets should have to be proven voluntary beyond a reasonable doubt. Canadian judges have also been unwilling to allow the defence to lead expert evidence in these cases to tell the trier of fact about the possibility of false confessions. The ultimate result is that there is no control over police tactics in these stings.

There has been one proven wrongful conviction as a result of these stings, that of Kyle Wayne Unger. Other wrongful convictions may come to light. Short of its outright abolition, probably the best way to control the sting and prevent wrongful convictions is to subject the statements to a formal voluntariness inquiry.

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Table of Contents

Permission to Use.....	i
Abstract.....	ii
Acknowledgments.....	iii
Table of Contents.....	iv
Introduction.....	1
Chapter One – The “Mr. Big” Sting and Its Elements.....	4
Chapter Two – Some Introductory Matters and Observations Arising from a Legal Analysis of the Sting.....	32
Chapter Three – The Section 7 Right to Silence.....	45
Chapter Four – Abuse of Process.....	58
Chapter Five – Expert Evidence.....	90
Chapter Six – Hearsay and Admissions.....	122
Chapter Seven – Voluntariness, Including Reliability, Person-in-Authority And the Hodgson Warning.....	154
Conclusion.....	187
Addendum on Secondary Sources	189
Bibliography.....	204

INTRODUCTION

This thesis will explore the phenomenon of the “Mr. Big” sting in Canada from both a legal and a practical perspective. Although the scholarly approach favours a legal perspective, there are many practical non-legalistic factors involved in an examination of the sting that must be examined and explained in order to make legal analysis of the problems presented by the sting understandable. Simply put, much of the thesis must of necessity focus on what might be called the ‘nuts and bolts’ of how the sting is run in its various guises and permutations. This focus requires a substantial amount of writing as an exercise in simple reportage before the legal issues surrounding the sting can be gone into in depth.

This being the case, it is proposed that the subject at hand can best be approached in the following manner in seven chapters. The first chapter, in order to deal with the above-mentioned practical issues, will consist of a fairly comprehensive overview of how the Mr. Big sting is run in Canada and the various scenarios that make up a successful operation. The second chapter will serve as an introduction to the legal analysis of the sting and raise a few issues of general importance. The third chapter will focus on the sting in relation to the right to silence under section 7 of the *Canadian Charter of Rights and Freedoms*.¹ The fourth chapter will focus on whether or not the sting is capable of being defined as an abuse of the court’s process. The fifth chapter will examine the issue of expert evidence in relation to the sting. The sixth chapter will examine whether admissions made by accused persons in Mr. Big stings can be classified as hearsay. The

¹ Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, hereinafter the *Charter*.

seventh chapter will examine the concept of legal voluntariness, but with particular attention paid to the person-in-authority requirement and its significance in relation to the sting.

Ultimately, in the briefest terms, the position of this thesis is that the statements made by accused persons to undercover officers in Mr. Big stings may well be unreliable due to the various influences put upon them to confess. It is submitted that the substantial possibility of the statements being unreliable is not taken seriously enough by Canadian courts. It is further submitted that this lack of caution is manifest in the nearly overwhelming commitment of Canadian judges to admitting Mr. Big statements into evidence regardless of the possibility of miscarriages of justice. Concomitant with this proposed state of affairs, it is the further position of this thesis that a thorough canvassing of Mr. Big jurisprudence reveals a pervasive and unchecked spirit of unfairness in Mr. Big cases. Possible solutions to the above problems may not be readily apparent, but it is submitted that some alternative to the current regime of unrestricted admissibility into evidence of these suspect statements is absolutely necessary.

In terms of methodology, it bears mentioning that the research base for this thesis consists almost entirely of an examination of case law. A small amount of commentary exists and has been of help. However, major treatises on evidence have for the most part confined themselves to citation of the leading case on admissibility and voluntariness in relation to statements made to undercover officers; i.e. *R. v. Grandinetti*,² and left it at that.

² 2005 SCC 5, 1 S.C.R. 27 [*Grandinetti*].

As a final note, it is worth mentioning that, although a few women have been targeted in the sting, the great majority of suspects in these cases are male. Therefore the male pronoun will be used in this thesis when referring generally to accused persons.

CHAPTER ONE – THE “MR. BIG STING” AND ITS ELEMENTS

The Mr. Big sting is an undercover police operation, undertaken in Canada by the RCMP, which aims to obtain evidence against a person who is suspected of having committed a serious crime. The crime being investigated is usually a homicide, although the sting has on very rare occasions been used to target persons suspected of other crimes, such as attempted murder.³ The person who is being investigated by the RCMP undercover team is generally referred to by them as the ‘target’, and that terminology shall be adopted in this thesis. The sting is alternately referred to in Canada as a ‘big boss’ sting or a ‘crime boss’ sting or occasionally as a ‘reverse sting’. It is a highly developed operation in Canada and is indeed referred to by Kirby J. of Australia’s High Court as the “Canadian Model”.⁴

The sting consists of a concerted effort by an undercover team of officers to convince a target that he or she has been recruited by a powerful criminal organization that is capable of great violence but that also is capable of giving great financial rewards to its members. Usually the target will be initially approached by one RCMP undercover operator in a seemingly chance encounter and invited on a casual basis to perform some small task for the initial contact officer, either in return for money, or simply out of a desire to help. If the target is receptive to the initial contact, further efforts are made by the undercover team to effect the creation of an employer/employee relationship between the undercover operators and the target. In addition, an impression of a bond of companionship is attempted in order to make the target feel at ease. Usually one officer,

³ *R. v. Joseph* 2000 BCSC 1891, 54 W.C.B. (2d) 547 [*Joseph*].

⁴ *Tofilau v. the Queen* [2007] HCA 39 at para. 117 [*Tofilau*].

referred to as the “primary” operator, will take on the role of friend and mentor to the target and hold out the possibility of a more full and meaningful membership in the gang if the target is deemed to be worthy by Mr. Big.

The target slowly becomes immersed in what he believes to be a nationally established criminal organization. The primary operator (who is usually, but not always, the same operator who made the initial contact with him) gives him jobs to do; such as delivering mysterious packages, driving automobiles to different locations, or depositing money into various bank accounts. In most cases the jobs become more apparently serious and the target is made to believe he is participating in substantial smuggling of drugs, guns or other contraband, counterfeiting operations and even in violent shakedowns of those who have crossed the gang.

Ultimately, the target is informed that he is expected to come clean to Mr. Big about every aspect of his criminal past including the homicide of which he is suspected. In some cases the target is confronted by the primary operator regarding the unsolved homicide, whereas in other cases the target volunteers the information of his own volition, i.e. the information that he has been (and continues to be) a suspect in an unsolved homicide or homicides. An interview is scheduled between the target and the purported boss of the criminal organization; and various reasons, arguments and inducements are presented to the target as to why he should confess to the boss that he has committed the crime that the police suspect him of having committed. Denials and other protestations of innocence, although not always forthcoming from the target, are generally frowned upon by the primary operator and by Mr. Big himself. Usually the target ends up confessing to the homicide to Mr. Big during the interview. The interview

has, of course, been audio- and video-recorded. The next step is the target's arrest for the crime. All of the statements he has made during the course of the sting are used against him as evidence at his trial.

The whole thing usually takes about four months.

A. THE TARGET

The target of a Mr. Big sting is, as previously stated, usually male. Notable exceptions are the targets in *R. v. Black*⁵ and *R. v. Boudreau*.⁶ Generally the target is not financially stable. A typical target was described as follows by D.J. Martinson J. of the British Columbia Supreme Court:

In the fall of 2004, the police embarked on what is known as a "Mr. Big" crime boss operation. At the time of the crime boss operation, Mr. Wilson's financial and personal circumstances can only be described as bleak. He had little, if any, income; he lived at least part of the time in a homemade trailer with almost no amenities. He had a beat-up old car. He had few prospects.⁷

The target in *R. v. Osmar* also claimed that he had been unemployed and unable to find a job when the RCMP approached him at the beginning of a Mr. Big sting.⁸

Although not all targets are significantly affected by poverty, some definitely are, and nearly none of the targets of Mr. Big stings could be described as middle class or upper class.

⁵ 2007 BCSC 1105, 75 W.C.B. (2d) 620 [*Black*].

⁶ 2009 NSSC 30, 274 N.S.R. (2d) 315 [*Boudreau*].

⁷ *R. v. Wilson* 2007 BCSC 1940, 76 W.C.B. (2d) 563 at para. 19 [*Wilson*].

⁸ 2007 ONCA 50, 217 CCC (3d) 174 at para. 19 [*Osmar (C.A.)*].

Two notable exceptions are Atif Ahmed Rafay and Glen Sebastian Burns, who are from affluent backgrounds and who were each convicted of three counts of aggravated first-degree murder in Washington State after a successful Mr. Big sting executed upon them while the two were residing in British Columbia. This affluence appears to have had a considerable influence on their situation. Burns' sister Tiffany is a successful television journalist who has produced a film entitled "Mr. Big: A Documentary" about her brother and Rafay's experience. Rafay and Burns' case has been kept in the public eye more than those of other targets, arguably due to the resources of Burns' sister, which are more considerable than those of the families of other convicted and incarcerated targets. The Rafay/Burns case possesses other unique characteristics from legal and other perspectives and will be referred to later in this thesis.

Along with a generally low-income level, targets are also usually not educated beyond a secondary or often a primary level. Many targets, although certainly not all, have also had no previous experience with the criminal justice system.

Also of considerable importance is the fact that a significant percentage of the targets have substance abuse problems including alcoholism. This was the case in *R. v. Hathway*,⁹ *R. v. Griffin*,¹⁰ and also in *R. v. Terrico*¹¹ in which one of the undercover constables testified to the fact that it was apparent to him that the target had a drinking problem.¹² This, of course, becomes significant in that many of the scenarios played out by the undercover operators involve alcohol consumption. It has been suggested in various defence arguments, with a glaring lack of success at all levels of the Canadian

⁹ 2007 SKQB 346, 323 Sask. R. 1 [*Hathway*].

¹⁰ 2001 MBQB 54, 154 Man. R. (2d) 1 [*Griffin*].

¹¹ 2005 BCCA 361, 199 C.C.C. (3d) 126 [*Terrico*].

¹² *Ibid.* at para. 8.

court system, that, by running scenarios involving alcohol on targets who are addicted to alcohol, the RCMP are encouraging admissions which may not be reliable.

Much more could be written about the typical target in a Mr. Big sting. Some are single, some are married, some are childless, while others are parents. They come from different ethnic backgrounds, although the majority appears to be Caucasian. Some First Nations individuals are targets, and it is an interesting fact that an inordinately high percentage of First Nations accused persons targeted by these stings are ultimately acquitted.¹³ Of course, unless specifically referred to by the court, it is generally not readily apparent from written judgments exactly what a target's ethnicity is; and, ultimately race and/or ethnicity does not appear to have much significance in our inquiry beyond the above-mentioned higher rate of acquittal for Aboriginal targets.

However, as a final observation, it is a striking feature in the history of the sting in Canada that it has on some occasions been executed on children. This circumstance will be examined in some depth later in this thesis.

B. A SIGNIFICANT EVIDENTIARY FEATURE

A major concern inherent in the overwhelming majority of Mr. Big stings is the fact that they are usually executed in criminal investigations where there is no other evidence implicating the target. That is, when the police suspect a target of having committed a homicide, but have absolutely no evidence linking that target to the crime, it

¹³ *R. v. Mentuck* 2000 MBQB 155 [*Mentuck*]; *R. v. Crane Chief* [2002] A.J. No. 1706 (Q.B.) [*Crane Chief*]; *R. v. C.K.R.S.* 2005 BCSC 1624, 68 W.C.B. (2d) 350 [*C.K.R.S.*]; *R. v. O.N.E.* 2000 BCSC 1200 [*O.N.E.*].

is only then that the powerful Mr. Big tool is selected from the investigative arsenal. In *R. v. Lowe* the trial judge remarked on this circumstance in phrasing which finds an echo in many Mr. Big sting cases:

With the exception of some evidence of motive and opportunity, the Crown's case rests entirely on admissions made by Mr. Lowe made in the course of the undercover operation. The Crown provided no physical ("real") evidence linking Mr. Lowe, his D.N.A., any object associated with him, or any place associated with him, with Mr. Rudy's D.N.A., clothing or effects, or with any place associated with Mr. Rudy. The Crown provided no evidence that a murder weapon was found. The expert opinion evidence as to the date of Mr. Rudy's death is inconclusive.¹⁴

Of course, since the Mr. Big confession is the only evidence pointing to guilt in most cases, it is of supreme importance to ensure that the confession is reliable.

On a logistical level, the fact that the confession evidence is the only evidence on which the RCMP and the Crown are relying¹⁵ gives the RCMP the advantage of being able to wait until years after the commission of the crime being investigated to launch the sting. The target, if guilty,¹⁶ will be relaxed and have his guard down, the murder having been committed so long ago.

C. THE HOOK

The operation begins with what appears to the target to be a chance meeting between himself and a friendly stranger who is eventually revealed to have associations

¹⁴ 2004 BCSC 1104, [2004] B.C.J. 1702 at para. 220 [*Lowe*].

¹⁵ This, of course, is not the situation pertaining to those not uncommon cases in which the target is persuaded to lead the police to the hitherto unknown location of the body of his deceased victim.

¹⁶ Or, for that matter, if not guilty.

with organized crime. This chance meeting can be orchestrated quite simply or can be more complex and imaginative. The most common opening scenario is probably that in which the target is approached by a stranger, often in a drinking establishment, shown a photo of an absent third party, usually a woman, and asked if he has seen her around. Of course the target has not seen the woman. At this point the target will be asked by the undercover operator if he will help to locate the woman in the photo for a reasonable fee. Ideally, the target will agree and end up spending the next few hours going around to different bars and other public gathering places, ostensibly looking for the woman in the photo. The undercover operator will offer money to the target for his help and try to get the target's contact information, which is usually forthcoming. After a day or two has passed the target will be contacted again and asked if he would like to earn some more money and the sting begins in earnest.

In another case the target was initially contacted when a young woman knocked on his door looking for help with a flat tire. When her boyfriend came by the next day to pick up the car, the target was convinced to help out by accompanying him to a mechanic.¹⁷ The boyfriend offered the target other work and he quickly became involved in what he thought was a criminal organization.

One of the more clever schemes to initiate contact took place in *R. v. Bridges*:

By posing as door-to-door market surveyor, an undercover RCMP officer convinced the accused to take part in a survey. The accused was then advised that as a result of his participation in the survey, he had won an all expenses paid trip to see a Calgary Flames hockey game in Calgary. The accused attended the game with a few other 'grand prize winners' who were also undercover police officers. One of the undercover police officers befriended the accused. Over the

¹⁷ *Hathway, supra* note 9 at paras. 36-37.

course of the next few months, the undercover police officer convinced the accused he was a member of a successful crime organization.¹⁸

In any event, this chance meeting between the target and the undercover officer leads to the target's involvement in the gang and is his first step on the road to a confession to Mr. Big.¹⁹

D. THE PRIMARY

The primary undercover operator, or simply the primary, is the person with whom the target has the most contact on a day-to-day level. The primary is usually, but not always, the same person who made the initial contact with the target. The primary is the undercover officer in charge of cultivating the relationship between the target and the undercover officers. He gives the target fake criminal tasks to perform which range from innocuous deliveries of packages up to ostensible support positions in fabricated criminal operations.

It is also the primary's job to inculcate respect in the target for the criminal organization and its integrity, as well as for the boss of the organization. In most cases, especially more recent ones, the target is made to understand that the best way to show respect and to be accepted is to be totally honest at all times and never to tell lies to anyone in the organization, especially the boss.

¹⁸ 2005 MBQB 142, 200 Man. R. (2d) 213 at para. 3 [*Bridges*].

¹⁹ Keenan and Brockman, in their book entitled *Mr. Big* (Winnipeg: Fernwood Publishing, 2010), have produced a more fully developed statistical analysis of the initial contact methods used by the undercover operators at page 53 thereof.

Of course, another job of the primary is to portray himself to the target as a ruthless, violent, merciless criminal who is not above killing in order to secure desired results for himself and for the criminal gang. Although the RCMP generally do not appear to represent themselves as members of a particular criminal gang, it is sometimes the case that targets make assumptions about with whom exactly they are dealing. For example, one target testified that he took his primary's comment that he was affiliated with an Eastern crime group which he referred to as the "family" as evidence that he had become involved with the Mafia.²⁰

Although the primary does perform other police tasks, the two above mentioned; i.e. stressing the importance of honesty and credibly manifesting the persona of a clever, Machiavellian thug; are probably the most important.

E. THE INITIAL JOBS

Initially the target, who is, as previously mentioned, often impecunious or close to it, is given somewhat menial tasks to perform by the primary. These initial jobs are not usually obviously criminal in nature, but they are often somewhat suspicious.

One of the tasks that a target might be asked to perform is driving a car from one location to another, parking it in a public lot and leaving the key on the back tire. Another task might consist of retrieving a bag or parcel from a bus station locker and then delivering it to another location or possibly handing it off to another undercover officer performing a 'cameo' role in the sting.

²⁰ *Hathway, supra* note 9 at para. 61, and see also *C.K.R.S., supra* note 13 at para. 37.

Another job that probably appears a little more suspicious to the targets is the money depositing/money laundering scenario, in which the target is given sums of money and asked to deposit them in various accounts at banks throughout a city.²¹

These tasks are always remunerated by the primary, who may pay the target as little as fifty dollars or as much as a few hundred. These tasks rarely net the target as much as a thousand dollars, but such sums are not entirely unheard of. In one case the target received a total of \$6,000 as a result of all of the jobs she performed for the gang.²²

In addition to direct payments, the primary may help to pay some of the target's bills or other debts, including picking up the tab for fuel or groceries.²³

F. "STANDING SIX", THE BAG OF CREDIT CARDS, THE BORDER SCENARIO AND TRAFFICKING IN DRUGS AND WEAPONS

Eventually, the target is drawn into participation in what appears to be overtly criminal activity. The initial apparent criminal task may simply consist of acting as a lookout for the police, or "standing six", while the primary operator ostensibly commits a crime.

More serious and obvious crimes that are portrayed by the gang include purported agreements for the sale of weapons or the sale of a bag of credit cards. The weapons, of course, are never actually shown to the target but usually are ostensibly inside a crate or

²¹ *Black, supra* note 5 at para. 156.

²² *Ibid.* at para. 157.

²³ *Ibid.* at para. 173, *Lowe, supra* note 14 at paras. 229-230.

pictured on a computer screen. Likewise, the credit cards in the bag are not actually stolen but are merely a prop.

One of the more intriguing purported crimes is the rarely used border scenario, in which a target is made to believe he is assisting the criminal organization in facilitating illegal activity across the border between Canada and the United States. This was described in *R. v. Casement*, in which it was used, as a scenario

in which Mr. Casement was taken to a location purported to be the Canada/US border and sent to retrieve a bag from a man on the "American" side. When handed the bag, Mr. Casement was told to be very careful with it. Thereafter, Mr. Casement transported the bag to Mission, British Columbia where he took it to a hotel room occupied by two undercover operators, one purported to be a member of the Muslim community and potential "purchaser" of the bag's contents. Inside the hotel room, the bag was opened and found to contain what appeared to be C4 explosive.²⁴

G. THE VIOLENT SCENARIO²⁵

The most controversial aspect of the sting may well be the violent scenario. As previously stated, one of the primary's main roles is to credibly present himself to the target as a violent, ruthless and successful criminal. An image of success is often conveyed by means of showing to the target evidence of a lavish lifestyle, such as driving an expensive car and wearing jewelry. Indeed the RCMP have been known to orchestrate dinner parties in expensive restaurants attended by upwards of a dozen undercover

²⁴ 2007 SKQB 422, 376 Sask. R. 67 at para 5 [*Casement*].

²⁵ Alternately, and somewhat cryptically, referred to as 'The Toni Scenario'.

operatives masquerading as gang members, all in order to impress the target with the apparent material rewards of gang membership.

The violent scenario is meant to bolster the primary's credibility with regard to the other end of the spectrum of criminal behaviour. The scenario usually involves the stalking, possible kidnapping, and assault of an individual who has crossed the organization; either by failing to pay a debt, informing to the police, or otherwise transgressing the rules laid down by the gang. The target usually participates by accompanying the primary on the mission, standing guard and otherwise providing 'back-up' to the primary while he menaces or beats the victim. The victim is, of course, another RCMP officer who may be professionally made up to appear to have bruised and bloodied features after the purported assault by the primary. The fake victim, often portrayed by a female officer, exhibits extreme terror in the face of the primary undercover officer's wrath, pleading for mercy from the latter which is only met by more violence and more threats, not just to the victim him or herself, but often to the victim's family members, which may include the victim's children

Possibly the most gruesome violent scenario in the reported cases occurred in *R. v. Steadman*, referred to in that judgment as "The Blood Scenario":

During the course of the undercover operation, the police had Mr. Steadman participate in destroying evidence of what he believed was a failed extortion attempt. On April 13, 2003 Mr. Steadman was told by R that his assistance was needed that evening to assist in dealing with some "trouble" that K was having. It was made clear to him that K had attempted to collect the debt owed by the man that had earlier attempted to pay the organization with sequentially numbered bills. The police had, in preparation for Mr. Steadman's arrival, splashed animal blood in a hotel bathroom and then dragged K through the blood from the bathroom to the hotel room door. A baseball bat was put in the room. When Mr. Steadman arrived with R, K was dressed only in a towel. He had just showered. He was obviously agitated; in Mr. Steadman's words he was

“freaking out”. He told Mr. Steadman and R that he had attempted to collect the debt owed by the man and in the process tried to hit him in the stomach with the bat, but the man had ducked the blow and K ended up hitting him in the head. Mr. Steadman was led to believe the man was in a car parked in the hotel parking lot. Another undercover officer, introduced as R’s cousin, was also in the room. R asked his cousin if the man was dead to which his cousin replied he was “out cold” but still breathing. R told his cousin to dump the man close to a nearby hospital. He told Mr. Steadman to clean up the room and provided him with latex gloves and some cleaning supplies for that purpose. He then told K that he was taking him to the airport for a flight to Ontario where K was to remain until any police interest in the matter passed. He also explained to K that the organization would arrange for an alibi for him. All of this took place in Mr. Steadman’s presence. He and R then bagged K’s bloody clothes. R left with K, leaving Mr. Steadman to clean the room. When R returned a couple of hours later he was alone. Mr. Steadman had cleaned the room thoroughly. They then put the towels he had used in the bag with K’s clothes and left. The accused suggested that they should throw the bat in the river, get some gas, and burn the clothes. They drove to his house and en route the accused threw the bat in a river. Once at his house Mr. Steadman retrieved some gas and, together with R, burned the bloody clothes.²⁶

An especially frightening subset of the violent scenario is one in which a purported victim is actually killed as a result of having displeased the criminal organization. In one case, in a scenario whimsically referred to as the “Whack at Yaak”, the target was made to believe that the primary undercover operator had shot and killed another criminal during a drug deal gone bad in Yaak, British Columbia to which he, the target, had driven the undercover officer. The target, Jason Dix, was waiting in the driver’s seat of a car outside the motor home in which he had been told the primary undercover operator was conducting the deal:

Ultimately, shots were fired and the operative left the motor home carrying a sawed-off shotgun. He turned toward the motor home, shot into it, approached it, and shot into it again. He then ran to the vehicle in which the Plaintiff was waiting and threw the sawed-off shotgun into the bush near the vehicle. He informed the Plaintiff that he had shot the individual in the motor home after that

²⁶ 2007 BCSC 483 at para. 56 [*Steadman*].

person had fired upon the operative and after that person attempted to cheat the operative of the money that the operative was to receive.²⁷

In a sinister turn, the undercover team then used this harrowing experience and the target's belief in his apparent participation in murder as a coercive tool to try to get a confession out of him:

For the next two days the Plaintiff remained with these individuals. He was subjected to extreme pressure by them, as they initially said that they did not believe what the Plaintiff told them about the Whack at Yaak, but then later accepted this story. They advised him that as now the Plaintiff had something on the gang which could be used by the Plaintiff and held over the gang, the gang would need something on the Plaintiff. Specifically, the Plaintiff was repeatedly asked about his involvement in the James Deiter and Tim Orydzuk homicides. He repeatedly denied any involvement. It is clear that during these discussions the Plaintiff was left with the impression that if he went to the authorities and told them about the murder he had witnessed, he would be killed by the gang. Several statements by operatives acting as members of the gang constitute clear threats.²⁸

The 'you have something on us, we need something on you' gambit will be discussed at greater length later in this thesis.

Interestingly, in *R. v. Black*, which dealt with a female accused, the target was merely informed of a scenario in which someone who had crossed the gang was murdered.²⁹

The violent scenario is problematic in that it arguably serves to intimidate the target in addition to building the primary's credibility. Some targets have attested to the galvanizing effect that the violent scenario had on them, making them feel that they too were subject to being seriously assaulted and killed if they failed to live up to the

²⁷ *Dix v. Canada* 2002 ABQB 580, 7 Alta. L.R. (4th) 205 at para. 126 [*Dix*].

²⁸ *Ibid.* at para. 130.

²⁹ *Black*, *supra* note 5 at para. 158.

expectations of Mr. Big and his gang or caused the gang to doubt their loyalty. This aspect of the sting is significant to the legal analysis and will be examined in greater depth later in this thesis.

H. THE MONEY COUNTING SCENARIO AND THE PAYDAY PROMISE

Two other significant scenarios are the money counting scenario and the payday promise. The money counting scenario takes place in many but not all of the stings. In this scenario the accused is given a large amount of cash to count, presumably representing just a small fraction of the criminal gang's ill-gotten gains. Although not much is ever made of this scenario in the judgments³⁰ it is contended that the money counting scenario may be significant in its effect on the accused. It is also contended that the scenario is probably calculated by the undercover operators to have a strong persuasive influence on the target. To place in the target's hands large sums of money, i.e. tens or hundreds of thousands of dollars, must have a significant effect on his psyche, particularly when one considers that targets are, as a general rule, impecunious. So much money is so close at hand, and if the target proves to be worthy he may, it is reasonable to assume, be entitled to take a share of that money.

The payday promise, which is a much more common feature of Mr. Big stings, dovetails neatly with the money-counting scenario. The payday promise usually consists of a 'big deal' or other large-scale criminal transaction that is presented to the target as being on the horizon for the criminal organization. The target can expect to take part in

³⁰ See for example *Joseph, supra* note 3 at para. 10.

the proceeds of whatever crime is taking place as long as he can satisfy the boss, Mr. Big, that he can be trusted.³¹ The proposed criminal operation could be helping in a large drug transaction or weapon transaction. The proposed payment could be as high as \$20,000 to \$30,000³² or even as high as \$80,000.³³ Sometimes it is purported to the target that the cash is kept in a safe deposit box and will be released to him upon his satisfying the boss and/or completing his role in the upcoming big deal.

The continued use of the money counting scenario and the payday promise technique, which are almost always both played out in close temporal proximity to each other, and which are generally executed closer to the culmination of the sting than its inception, arguably inject a powerful element of greed into an undercover operation which already heavily relies on psychological manipulation, such as the shock inherent in the above-mentioned violent scenario, to elicit confessional statements from the target. Indeed, the payday promise is even used in those cases where children are targeted. The circumstances in *R. v. O.N.E.* are illustrative:

5 The investigation took a form very similar to the investigation in Mentuck. It involved the use of the “crime boss” scenario, in which suspects are initiated into a purported criminal organization. O.N.E. and Kilpatrick bought and sold cigarettes they were told were illegally obtained, were led to believe they were to take part in a major drug deal which would pay them US\$50,000, had food, clothes and hotel rooms paid for by undercover operatives, and witnessed feigned anger and violence, including a severe beating staged for the consumption of O.N.E. The accused and Kilpatrick were progressively allowed to feel more involved in the organization and eventually were introduced to the “boss” of the organization, for whom they had been directed by the undercover operatives to show great respect.

³¹ *Lowe, supra* note 14 at para. 230.

³² *R. v. Forknall* 2000 BCSC 1694, 71 W.C.B (2d) 575 at para. 7 [*Forknall (voir dire)*].

³³ *R. v. Bonisteel* 2008 BCCA 344, 236 C.C.C. (3d) 170 [*Bonisteel*].

6 The “crime boss” informed O.N.E. that Vancouver police were preparing to arrest her for the second degree murder of Steudle. To that end, the “boss” produced bogus internal police memoranda discussing the intended arrest. He told O.N.E. that he could have a dying former member of the organization confess to Steudle’s murder and thus exonerate O.N.E. if she could provide him with sufficient details to make the confession credible. The accused repeatedly denied any involvement in Steudle’s death. The “crime boss” implied that she would no longer be permitted to remain with the organization and that she would lose the opportunity to be paid the US\$50,000 cash that she had earlier been shown. Furthermore, the undercover officer playing the “boss” made clear that any help in the purported second degree murder charge would be withdrawn without an adequate response to the boss’s inquiries. After continued pressure, she eventually confessed to a role in Steudle’s death.³⁴

Clearly, the strength of the psychological pressure of the payday promise, in a form such as that described above, adds significantly to the pressure that is brought to bear upon the target and his motivation to confess.

I. THE INSINUATION THAT ARREST IS IMMINENT

This element of the sting takes different forms and generally arises closer to the end of the sting than the beginning. Essentially, it will be brought to the target’s attention that the police are closing in on him as a suspect and he is likely to be prosecuted for the crime of which he had been previously suspected but for which he had not been prosecuted. This is effective due to the fact that the majority, if not all, targets of Mr. Big stings were indeed associated in some way with the murder in question, either as out-and-out suspects, as persons of interest, or merely as witnesses. This insinuation takes

³⁴ 2001 SCC 77, [2001] 3 S.C.R. 478 at paras. 5 to 6 [*O.N.E. Publication Ban*]. Although this target was acquitted at trial, the issues regarding a publication ban in her case were litigated all the way to the Supreme Court of Canada.

various forms. In some cases uniformed policemen may simply show up at the door of the target and inform him that he is still a suspect in the case and that the police may wish to have more contact with him later and possibly collect samples of his DNA.³⁵ Other techniques include ‘prop letters’ such as those referred to in the above-cited excerpt of *R. v. O.N.E.* A third favourite ploy involves the police collaborating with local television or radio broadcasters to air ‘crimestoppers’-style public service vignettes at coordinated times when they know the target and the primary will be together with their set tuned in.³⁶

The purpose of these insinuations appears to be to keep the target aware of his vulnerability to the police and to increase the likelihood of his reliance on the criminal organization to save him from being arrested, prosecuted and convicted.

The insinuations that arrest is imminent often take place before the meeting/interview with Mr. Big. However, Mr. Big often himself alludes to the fact that arrest is imminent, through the use of prop letters and other ruses, during the interview with the target. Again, the above cited excerpt from *R. v. O.N.E.* shows an example of this tactic.

J. THE CAMEO

The cameo, as an aspect of the Mr. Big sting, is a somewhat curious and definitely interesting element. In a general sense, a cameo consists of a brief appearance in a sting scenario by an undercover officer who is not substantially connected to the particular Mr.

³⁵ *Hathway supra* note 9 at para. 93.

³⁶ *Osmar (C.A.)*, *supra* note 8 at para. 10.

Big undercover operation. In fact, in the judgments it is suggested that usually the cameo operator is not even aware of who the target is in the sting in which he is participating as a 'bit player'. A cameo may consist of an undercover operator simply sitting in a public place and receiving a package or a case of some kind from a target who believes he is transporting illicit goods. No words may even be exchanged between the target and the cameo operator, or if there are words they may be limited to something along the lines of "here is the case" and "thank you". The cameo operator presumably reports back to his supervisor, files a report, and then leaves the operation. Further information on how the cameo operators are selected is sparse, as the only source of information is the judgments themselves.

However, a more specific kind of cameo used to greater effect is the cameo appearance of Mr. Big himself. Although not used in all of the stings, it appears to have some effect on the target:

This scenario involved a "chance" sighting of the crime boss in a public restaurant in Calgary. Mr. Hathway had no prior knowledge that this was to occur, and a staged phone call set the scene. Mr. Hathway and Constable Chubbs were in a bar with another operative (providing Constable Chubbs with samples of counterfeit products). The other operative produced a new \$100 bill which was genuine and indicated that it was counterfeit. At that time, the call came and they left. Mr. Hathway asked if there was a problem, and Constable Chubbs indicated they had to meet someone downtown. He then indicated they were going to see "the Boss". He told Mr. Hathway to be respectful, truthful and honest. They walked in and Constable Chubbs observed Sergeant Dibblee and his "bodyguard". They walked in and the "bodyguard" greeted Constable Chubbs but stopped Mr. Hathway and directed him to sit in the lounge. This was the prelude for a later actual interview with the crime boss. Approximately 30 minutes transpired, and Constable Chubbs left to get Mr. Hathway. Mr. Hathway inquired if everything was okay, and Constable Chubbs simply indicated that he had gotten "chewed out" by "the Boss" for bringing Mr. Hathway. They then discussed honesty, trust and loyalty, and Mr. Hathway assured Constable Chubbs that he would never let him down.

The “bodyguard”, another undercover operative, is a large man with a body builder’s physique, and he physically stood in the way to prevent Mr. Hathway from following Constable Chubbs.³⁷

Although the rationale underlying these cameo appearances of the boss is not clear from what the police witnesses usually have to say at trial, it has been suggested by the defence that they are a means of convincing the target that he has gotten deeper into the business of the gang: he has now seen the boss’s face and knows more, maybe an unacceptable amount, about the gang. This arguably puts the target in a seemingly more vulnerable position.

K. THE INTERVIEW

The culmination of the Mr. Big sting is the interview between Mr. Big and the target. The interview is recorded in both video and audio. It is in this scenario that the boss attempts to elicit a confession to the murder or murders of which the target is suspected. We have already touched upon the various insinuations made to the target that arrest is imminent, both before and during the interview. However, other varied and generally successful tactics and inducements are used and held out to the target in order to convince him to confess.

i. Mr. Big solves all problems, but you must confess. The primary tactic, of which all the other tactics are arguably only facets, is the strong message that Mr. Big can make all legal problems relating to the unsolved murder disappear. To this end, Mr. Big generally makes it known to the target that he is convinced of the target’s culpability and

³⁷ *Hathway, supra* note 9 at paras. 87-88.

that he wants to know the full details of the target's involvement. This full conviction of Mr. Big that the target is complicit in the crime, to the extent that he is unwilling and unable to believe otherwise, is pointed up in several of the judgments. The following excerpt from a British Columbia Court of Appeal judgment is typical:

The appellant's confession was obtained in his discussion with B.A. on 8 February 2000 at the culmination of the R.C.M.P. undercover operation in which several police officers played roles of criminal gang members, and B.A. was the boss of the organization. The sophisticated and elaborate scenarios set up by the police portrayed B.A. as a person of great power and authority, the opportunity of membership in the gang for the appellant as one holding the promise of great financial gain, and the appellant's membership in the gang as being dependent upon his absolute truthfulness with B.A. By the time of the confession, various gang members, and B.A. himself, repeatedly had told the appellant that they believed he had killed his wife, and that unless he was frank with B.A. about that, he would be unacceptable as a member because he could not be trusted, and neither he nor others could be protected from further police investigation.³⁸

As a general rule, denials of culpability are not accepted by Mr. Big. Sometimes judgments make only passing reference to denials, as is the case in *R. v. Peterffy*, in which it is stated that “[a]fter initially denying any involvement Peterffy said that he “took care of business”.”³⁹ Some judgments go more in depth. Indeed, some of the judgments point up a certain air of resignation on the parts of some targets:

[53] Mr. Angly also points to the use of almost irresistible inducements and the implied threat that anyone who endangered the organization would be killed. In addition, he notes that the accused were encouraged by undercover operators to indulge in the consumption of alcohol.

³⁸ *R. v. Skiffington* 2004 BCCA 291, 186 C.C.C. (3d) 314 at para. 34 [*Skiffington*].

³⁹ 2000 BCCA 132, 45 W.C.B. (2d) 315 at para. 6 [*Peterffy*].

[54] The result of all this, he submits, was revealed in Mr. Raza's remark about the homicide to an undercover operator that, "You're making me want to say I lined it up, and that's the only way you'll be happy".⁴⁰

ii. The fall guy. In addition to the refusal to accept the denial of responsibility, Mr. Big also usually implements the 'fall guy'⁴¹ tactic as a way to elicit a confession from the target. In simplest terms, the crime boss will inform the target that he has in place an operative who for various reasons is willing to confess to the murder the target is suspected of having committed. However, this can only happen if the target is absolutely truthful with the boss and gives him as much detailed information about the commission of the killing as he can. The information will then be relayed to the fall guy who will volunteer a detailed confession to the police putting the target in the clear.

Usually the purported motive for the fall guy's confession is that he is terminally ill. Sometimes the fall guy is purported to be acting for money.⁴² In one case it was put to the target that the fall guy was awaiting execution in Thailand, and that if he confessed to a murder in Canada his life could be spared and he could be sent home to do his time in the presumably better conditions of a Canadian prison.⁴³ In any event, the need for details of the killing are required.

iii. Earth, Fire, Dumpster, Water. It is notable that the details are often uniform in many respects. The most compelling similarity in this respect is the means by which targets say they have disposed of murder weapons and other physical evidence. Murder weapons are invariably thrown into bodies of water (and are never found later by the

⁴⁰ *R. v. Raza* 1998 CanLii 5352, 1998 B.C.J No. 3242 (B.C.S.C.) at paras 53 and 54 [*Raza*].

⁴¹ Sometimes inexplicably referred to as the 'Henry fall guy' tactic. Go figure.

⁴² *Peterffy*, *supra* note 39 at para. 6.

⁴³ *Black*, *supra* note 5 at para. 205.

police). Clothes are either burned or thrown into dumpsters (again, never, ever found by the police, though perhaps more understandably). To a student of these stings, reading the details given by targets in their Mr. Big confessions as they relate to this physical evidence provides food for thought. If one were to murder someone with one's bare hands, or a knife, or a gun how would one attempt to dispose of the evidence? By throwing it into a river? By burning or burying? And, of course, the more important question: If one were called to give an accounting to Mr. Big of a murder one *had not committed*, what details would one come up with to convince Mr. Big of the truthfulness of the confession? At least within the scope of the research underlying this thesis, not one of the targets in any operation in the history of the Mr. Big sting has ever handed over a weapon to the boss and said 'here it is, this is what I killed him with' or handed over a pair of gloves or other clothing and said 'here, this is what I was wearing when I did it'. The evidence is, almost without exception, irretrievable and, of course, no evidence at all. This, however, is not the case with all physical evidence deriving from the Mr. Big interview.

iv. The gold standard – the body. Although murder weapons and other evidence are never retrieved as a result of the sting,⁴⁴ it is the case that sometimes the accused will lead the police to the previously unknown location of the dead body in order to prove that he is a killer. This was evidently the situation in the case of *R. v. Casement*.⁴⁵ Casement was found guilty of first-degree murder by a jury after becoming the target of a Mr. Big sting. A unique feature of the sting in which he was caught was the fact that he was being investigated for the murder of a different victim altogether. He denied all

⁴⁴ As far as we know.

⁴⁵ *Casement*, *supra* note 24 at paras. 3 to 6.

involvement in that crime to the gang, but he did volunteer that he had committed another murder, this second deceased having been missing for some years and not even officially classified as a homicide victim. He led the police to where he had left the body and was prosecuted for that murder, although not for the initial one of which he was suspected.⁴⁶

Cases like Casement's are rarer than those in which the target leads the police to an area at which the police already know the body to have been found. This can be problematic when one considers the possibilities of conscious or unconscious leading of the target. Cases also exist where targets lead police to a general area that is correct, but are unable to pinpoint the exact location where the body was found or get it wrong.

v. You have something on us, we want something on you. As previously mentioned in referring to *Dix v. Canada*, this is another area of the sting that is problematic, arguably on a level approaching that of the violent scenario. Like the violent scenario, it is not used in every Mr. Big sting, but it is not uncommon either. This facet of the sting, usually used during the interview or as a prelude to the interview, consists of the target being informed that, since he now possesses so much personal information about the criminal organization, including the possibility of having seen the boss's face during a "cameo" scenario, it is necessary for the target to give the gang inculpatory information about himself that they can hold over him or 'have on him'. Essentially, in order for the gang to feel comfortable about the target, he must confess to a serious crime.⁴⁷ The initial and explicit consequence is that if he does not confess the gang will feel uncomfortable about him; with secondary, more implicit consequences

⁴⁶ *Ibid.* at paras. 28 and 46 to 51.

⁴⁷ See *R. v. Osmar* [2001] O.J. No. 5797 (Ont. S.C.J.) at paras. 12 and 49 [*Osmar* [Ont. S.C.J.)].

being left mainly to the target's imagination. Interestingly, in at least one case the target testified that he volunteered a confession pre-emptively, in an effort to build trust with the gang by giving them something to hold over him.⁴⁸

vi. The primary's voucher. A further feature associated with the interview is the impression upon the target that the primary has vouched for him to the boss and, as a result, his credibility is on the line. The primary tells the target that he needs to tell the boss the truth about his involvement in the murder or else he, the primary, will look bad.⁴⁹

L. THE ARREST

After the confession is given to Mr. Big the target is allowed to go on his way. Presumably pending some sort of approval process involving examination of the recordings,⁵⁰ the target will be arrested a few days later and charged with the murder. In some instances it does not dawn on the target that he has been tricked and he may attempt to contact the primary for help.⁵¹

M. ONGOING THEMES – THE NECESSITY OF HONESTY AND TRUST, THE DANGEROUSNESS OF THE GANG, THE ABILITY TO WALK AWAY

⁴⁸ *R. v. Lowe*, *supra* note 14 at para. 249.

⁴⁹ *Ibid.* at para. 257.

⁵⁰ How this works is not apparent from caselaw.

⁵¹ *Hathway*, *supra* note 9 at para. 128.

Trial transcripts, recordings of conversations between the target and undercover officers, and judgments of the courts disclose that throughout many Mr. Big undercover operations the target is constantly made aware of the fact that he is expected to be completely honest and forthcoming with members of the gang, and that the ability for all gang members to trust each other is the foundation of the gang's success. The target will sometimes be told that even if he makes mistakes and messes up jobs he should never try to hide that fact from the primary or other gang members, not least because if he is honest about making mistakes and how he has made them, it may be possible for the boss, through his influence, to fix whatever problems the target has created.

Another theme, related to the general theme of honesty mentioned directly above, which often runs throughout a Mr. Big sting is the general attitude of boastfulness in which the target will sometimes engage. Because the target is hoping to join a criminal gang, he may be tempted to lie about the extent of his criminal involvement, claiming to have committed crimes, even committed murders, which he had nothing to do with in order to impress the gang. Significantly, it is not unknown for the primary or the boss to express incredulity at the target's claims, telling him not to "bullshit".⁵²

In fact, lies told by the target to the undercover officers at all stages of the sting are a common feature of the operation. Trial judges⁵³ recognize this and often provide particulars of proven lies told by targets in their judgments:

Mr. Lowe lied to Jason about a number of matters. These included: his navy record; his experience in dealing with difficulties at the nightclub; his knowledge of gangsters; his sexual exploits; his ability to move cars across the border with his dealer card and to obtain fake T4 slips; his driver's license status; and other

⁵² *R. v. Casement*, *supra* note 24 at para. 5.

⁵³ and presumably juries.

collateral matters. He gave varying accounts to Jason and Mr. B regarding his business relationship with Mr. Rudy, for example with respect to how much money was at stake. He told them that before he killed Mr. Rudy, he told people that Mr. Rudy would be away on business. (However, the Crown led no evidence confirming that.) His account to Mr. B of the history of the nightclub was different in some respects from the account he gave to Jason. He told Jason that his partner was stealing from him. He said that he had bought the nightclub building. He said that he was paying \$10,000 a week, not \$5,000 or \$2,000.⁵⁴

Obviously the fact that a target tells lies to the primary and to Mr. Big is significant, for reasons that will be examined more fully in the legal analysis undertaken later in this thesis.

Two final related ongoing themes which are present throughout the sting are, firstly, the continuous message to the target that the gang is indeed a very dangerous, organized, efficient and ruthless entity, obsessed with security, and not to be crossed on pain of death; and, secondly, the vaguely contradictory message that, despite everything that happens, despite any of the fake crimes he has committed, witnessed or in some way been privy to, the target is allowed at any time to sever his ties with the gang and ‘walk away’. This is a theme that recurs in many of the judgments. In *R. v. Forknall*, the Voir Dire Judge stated that “neither Mr. Copeland nor Mr. Forknall were ever detained. It was made clear to both they did not have to participate if they did not want to”,⁵⁵ but a few paragraphs later he also makes the finding that:

No direct threats were made to either Copeland or Forknall. Each may reasonably have inferred from Constable Bentham comments about getting “whacked” (killed), and “he kicks my ass once I kick your ass twice” and similar statements that breach of the rules of the criminal organization they were seeking to join could well lead to violence against themselves.⁵⁶

⁵⁴ *R. v. Lowe*, *supra* note 14 at para. 313.

⁵⁵ *Forknall*, *supra* note 32 at para. 13.

⁵⁶ *Ibid.* at para. 15.

The juxtaposition of the ‘free to leave at any time’ policy with the purported strict discipline and secrecy of the gang, backed up by casually dispensed violence and the autocratic rule of a deeply suspicious crime boss, may not make sense to some observers. That said, it is a paradox that has not appeared to carry much weight with triers of fact in the Canadian criminal courts.

N. CONCLUDING COMMENTS ON THE STRUCTURE OF THE STING

Not every unique feature of the Mr. Big sting has been described in this initial chapter. However, enough has been outlined to allow a broad discussion of the various legal problems that the sting raises. As previously stated these include problems relating to the confessions rule and voluntariness, section 7 rights to silence, abuse of process, expert evidence issues, admissibility under hearsay exceptions and, ultimately, fairness. All of these will be discussed in the following chapter.

CHAPTER TWO – SOME INTRODUCTORY MATTERS AND OBSERVATIONS

ARISING FROM A LEGAL ANALYSIS OF THE STING

A. OVERVIEW OF LEGAL QUESTIONS AND ISSUES TO BE DISCUSSED

There is no question that numerous legal questions and issues arise from the implementation of the Mr. Big sting in Canada. It is safe to say that these questions and issues are all defence-related since the use of the sting has been endorsed at all levels of the Canadian court system. For the prosecution little if any issue with the legality and admissibility of evidence gathered through the sting arises because Mr. Big confessions are quite simply always ruled to be admissible. The fight over Mr. Big evidence in Canada is one carried on entirely by the defence.

At least in layman's terms, Mr. Big sting evidence is first and foremost confession evidence, and as such the question of voluntariness under the common law arises as defined by Iacobucci J. in *R. v. Oickle*.⁵⁷ However, a cursory perusal of Mr. Big jurisprudence reveals that voluntariness is considered by the Canadian judiciary to be of little if any importance in determining admissibility in these cases. This state of affairs has much to do with the ruling in *R. v. Grandinetti*⁵⁸ in which a majority of the Supreme Court of Canada affirmed that voluntariness as it is defined in Canadian criminal law did not arise as an issue in Mr. Big/crime boss cases due to the fact that police undercover operators are not capable of being defined as persons in authority for the purposes of the common law inquiry as described in *R. v. Oickle*.

⁵⁷ 2000 SCC 38; [2000] 2 S.C.R. 3 [*Oickle*].

⁵⁸ *Grandinetti*, *supra* note 2.

The blanket exclusion of Mr. Big cases from the common law voluntariness inquiry is indeed problematic. The question arises as to whether or not the voluntariness rules in Canada are comparable to the rules regarding hearsay exceptions that existed before the landmark case of *R. v. Khan*.⁵⁹ That is, has Canadian law on the determination of voluntariness in criminal cases become overly rigid and ossified, too firmly reliant upon and attached to a ‘categories approach’ in its reasoning and application? It is the position of this thesis that this is indeed the case.

When one considers the underlying principles of our law of confessions, it is clear that our treatment of Mr. Big confession evidence denotes an attitude towards fundamental notions of fairness that seems to have jumped the tracks. As Iacobucci J. noted in *R. v. Oickle*, the essential problem with admitting involuntary confessions is that they may be unreliable. Reliability, it is argued, is something determinative. It is not, contrariwise, something that can be mechanically determined by resort to evidentiary rules that may have been outstripped and rendered ineffective by continuing developments in police investigative tactics and strategies throughout legal history.

To base a determination of the voluntariness, and hence the reliability, of a confession solely on whether or not the declarant knew he or she was speaking to a police officer or other traditional person in authority is no longer a conscionable option, at least in the context of a Mr. Big case when a life sentence for murder is on the line. This, of course, is not to say that the knowledge of whether or not the receiver of an inculpatory statement is a person in authority is irrelevant, but it is urged that the authoritative status ought only to be considered as one of many factors in determining whether or not a

⁵⁹ [1990] 2 S.C.R. 531, 59 CCC (3d) 92 [*Khan*].

confession in a Mr. Big sting should be considered voluntary or reliable enough to be admitted as evidence.

The present state of the Canadian law is that Mr. Big confession evidence always passes the test for threshold reliability determined by the trier of law. Ultimate reliability is a matter to be determined by the trier of fact. The current state of affairs has juries nearly always finding these confessions reliable and returning verdicts of guilty.

Closely related to, if not subsumed in, the question of voluntariness is the issue of the Hodgson warning arising out of the judgment of the Supreme Court of Canada in *R. v. Hodgson*.⁶⁰ The facts in this case concerned a confession made by an accused who had disclosed to the parents of a young complainant that he had sexually assaulted her. After confessing some facts to the parents, the complainant's mother struck the accused and the complainant's father held a knife to the accused's back while they waited for the police to arrive. In these circumstances the accused made more inculpatory statements. The Supreme Court of Canada had the opportunity to modify the person in authority rule but "declined to eliminate the requirement".⁶¹ Instead, the Supreme Court of Canada ruled that the trier of law in such cases may choose to instruct the trier of fact that statements made in such circumstances may be unreliable and untruthful.

It is arguably telling that there needs to be a legal doctrine in place, a doctrine decidedly optional in its application, relating to how triers of fact ought to view confessions obtained in an atmosphere of violence.

Besides the common-law confessions rule and the attendant Hodgson warning, the significance of section 7 of the *Charter* will also be examined in the legal analysis.

⁶⁰ [1998] 2 S.C.R. 449, 127 C.C.C. (3d) 449 [*Hodgson* cited to S.C.R.].

⁶¹ *Terrico*, *supra* note 11 at para. 30.

As a general rule, it suffices to say that just as the lack of a traditional person in authority in a Mr. Big sting forecloses the application of the voluntariness test, so does the lack of a traditional detention situation take away from the accused the availability of the *Charter*-protected right to silence. Accused persons in these cases have attempted to argue the formation of a kind of psychological detention in the unfolding of the sting but with no success. That said, section 7 does bear some examination in the context of Mr. Big confession evidence. In particular, the defence in one case attempted to argue that the common-law voluntariness rule as it now stands, with its insistence upon the person in authority requirement, is itself contrary to section 7 of the *Charter*.⁶²

Another major attack that the defence in Canada has made upon the admissibility of Mr. Big confession evidence is on the basis of the doctrine of abuse of process. Once again the efforts of the defence have been fruitless in this regard. In cases in which this argument has been advanced judges note the necessity of balancing the possibility of damage to the integrity of the administration of justice against the need of society to effectively investigate and prosecute crimes. It is also in the context of the abuse of process argument that judges in their written reasons tend to reflect metaphorically upon the difference between mere tricks and dirty tricks. From reading the judgments there appears to be a line in the sand between these two species of deception, never really adequately located or defined by the judges. In practice it appears never to be possible for police actions in Mr. Big stings to cross the line from acceptable to unacceptable; no matter how evidence is obtained it is always admissible.

⁶² *R. v. Forknall* 2003 BCCA 43 at para. 24 [*Forknall (C.A.)*].

This state of affairs, it is argued, is especially troubling in situations where, for example, targets with serious alcohol addiction problems are encouraged by undercover operators to drink alcohol. Another troubling situation is that in which a target is made to believe that he has participated in a gang-sanctioned execution or serious assault on somebody who has crossed the criminal organization. One might think that convincing a target that he had become entangled in a gangland murder, or giving free and unlimited access to alcohol to an alcoholic before attempting to get a confession out of him, would give rise to serious doubts in a judge's mind about the propriety of police tactics. However, in Canadian courts the evidence is never excluded on the basis of abuse of process. The test, referenced ubiquitously in the jurisprudence, is whether or not the police behaviour would 'shock the conscience of the community'. Judges have uniformly decided that the community's interest in solving (or at least resolving) murder cases outweighs the questionable nature of Mr. Big tactics. In fact, almost no judges find Mr. Big tactics to be questionable at all.

A fourth legal issue, one which has actually made some limited headway in the defence's opposition to Mr. Big evidence, is the question of the admission of expert evidence on the phenomenon of false confessions. A majority of judgments continues to exclude expert evidence on the basis of the criteria as set out in *R. v. Mohan*,⁶³ often classifying expert evidence on false confessions in a Mr. Big sting as novel science, and citing Sopinka J.'s admonition that courts need to focus greater scrutiny on it for that reason. Psychological studies and social science studies on false confessions were

⁶³ [1994] 2 S.C.R. 9, 89 C.C.C. (3d) 402 [*Mohan* cited to S.C.R.).

endorsed by Iacobucci J. in *R. v. Oickle*.⁶⁴ However, because the material cited in that case concerned the effect of police tactics in traditional interrogations, it is generally not understood by the courts to be authority for admitting expert evidence on false confessions in Mr. Big cases.

There have, however, been a few cases where expert evidence was ruled admissible by the trial judge, such as *R. v. C.K.R.S.*⁶⁵ Interestingly, this was one of the few Mr. Big cases that resulted in an acquittal. Ultimately, it may be that the area of expert evidence is where defence attempts to locate a chink in the armour of Mr. Big eventually meet with success.

Another evidentiary issue to be touched upon in the debate over admission or exclusion is whether or not the target's statements to undercover officers should be treated as hearsay and relatedly, whether or not they should be considered admissions against penal interest.

The above-mentioned evidentiary issues will all be separately examined at greater length in the chapters three to seven of this thesis. However, one other evidentiary concern that bears some mention, although it is only very rarely the subject of direct judicial commentary and will not be examined in a separate chapter, is the veritable mountain of evidence that a Mr. Big sting can produce. As stated in the first chapter, these stings can often take four months or longer to execute. The time needed for defence counsel to view and listen to all of the video- and audio-taped evidence, as well as the time needed to peruse transcripts of the recordings (the recordings are notorious for their poor quality and for being frequently inaudible), plus the time needed to examine

⁶⁴ *Oickle*, *supra* note 57 at paras. 34 to 45.

⁶⁵ *C.K.R.S.*, *supra* note 13.

police notes and other evidence arising over the length of the operation, can easily end up amounting to hundreds of hours or more. It is often the case that defence counsel is hard-pressed to stay on top of all of the disclosure arising out of the Mr. Big investigation, especially when one lawyer is attempting to conduct the defence all on his or her own. The fact that many of the targets are impecunious, which, as previously mentioned, is often a defining feature of these cases, further complicates matters as court-appointed counsel can have trouble securing adequate remuneration for the considerable amount of work that must be done on these cases.

B. THE SPECTRE OF MURDER AND THE SHADOW OF KYLE UNGER

As mentioned in the first chapter, murder is nearly always the crime that is the subject of the Mr. Big technique. Murder is often decried as the most serious crime known to Canadian law. Sometimes crimes against the state such as treason and others enumerated in s. 469 of the *Criminal Code*⁶⁶ are equated with it in terms of seriousness; however, even members of a stateless society fear murder, whereas those of us who are citizens of the state rarely fear spies and traitors as much as we do the killers whom we know to live among us. A visit to the true crime section of any local bookstore makes it clear that our society takes great interest in murder, especially sexually motivated murder and serial murders. The content of television programming is just as fully made up of murder as the content of the advertising that sustains it is made up of sex. Murder informs our contemporary consciousness, and our knowledge of an unresolved murder is

⁶⁶ R.S.C., 1985, c. C-46.

like that of an unconsummated marriage. We simply cannot stop questioning it as an unacceptable state of affairs.

Murders need to be resolved and Mr. Big delivers the desired result. However, unsettling loose ends remain. First and foremost, it is necessary always to keep in mind that there are only rarely witnesses to murder, and even when there are, they are only very rarely independent, disinterested, and hence reliable. Frauds and thefts are often captured on video. Vehicular crimes are witnessed. Victims of all violent crimes except murder can accuse their alleged attackers in court. That said, the biblical image of the first murder victim Abel's blood crying out from the ground is only wishful thinking. Murder is silent and puzzling.

The significance of confession evidence in murder cases therefore arguably takes on added, perhaps undue significance if only because it breaks the silence surrounding the crime. The families of the victims of other crimes probably experience a notable increase in the amount of sound and noise in their lives: the voices of lawyers, of police, of the victims themselves who may be traumatized and the voices of doctors caring for them. The families of the victims of unsolved murders must instead contend with the silence of police who have no leads, the silence of the courts that have no case to try, the silence of the perpetrator who has eluded detection and, most significantly, the silence of the victim. The Mr. Big confession relieves the silence but it is for that reason that it ought to be carefully scrutinized at all stages of court proceedings. Of course the need for scrutiny is at least doubled when one considers, as one must, that in the majority of Mr. Big cases the confession is the only evidence on which a conviction can rest. The operation nearly always only takes place when the police have no forensic evidence, no

identification evidence, no other confessional evidence, in fact, nothing other than suspicion sharpening their aim on the target. This significant and glaring evidentiary feature should never be given less weight than it warrants.

The most significant development in the law regarding Mr. Big stings since their inception recently occurred with the overturning of the conviction of Kyle Wayne Unger in 2009. Unger, along with a co-accused Timothy Houlahan, had been convicted by a jury of the brutal sexual murder of a teenage girl in 1993. The facts were extremely harsh. The victim was under eighteen and had been sexually assaulted prior to her death. Additionally, her corpse was desecrated as sticks were inserted into her vagina and anus after her death. Unger was convicted and his conviction was upheld on the strength of a hair fibre found on the victim which was consistent with his own, the evidence of a jailhouse informant who claimed Unger admitted to him that he had committed the crime, and a confession to undercover police masquerading as a criminal gang. Years later it was determined that the hair found on the victim's body was in fact not Unger's. Also, the judicial attitude towards jailhouse informant evidence had changed substantially since the time of Unger's conviction. It had previously been routinely admitted, but by 2009 it was subject to so much scrutiny as to be nearly inadmissible. Following a review by the Federal Minister of Justice, Unger's retrial was ordered. The prosecution thereafter withdrew the charges and Unger was acquitted.

Kyle Unger represents the first instance in Canadian law of an acknowledged wrongful conviction arising out of a Mr. Big sting. Although in this instance it is quite probable that Houlahan had been the only perpetrator of the crime with Unger being only

an unfortunate patsy, it is possible that the real killer is still at large.⁶⁷ This case's significance will be examined more fully later in the thesis, however at this point it suffices to say that it, as well as the thirteen years served by Unger in the penitentiary, casts a long shadow over all of the cases and convictions that have resulted from these operations.

C. A FEW MORE WORDS ABOUT METHODOLOGY

Before embarking in earnest on specific discrete areas of legal analysis, it is necessary to note that efforts to compartmentalize the discussion according to established, textbook evidentiary principles may not always be entirely successful. For example, issues of expert evidence witness testimony on false confessions tends to overlap with the common-law rule on voluntariness, in large part due to Iacobucci J.'s reliance upon scientific evidence in *R. v. Oickle*.⁶⁸ Another example is the fact that the existence of threats, promises, inducements, coercion, and an atmosphere of oppression in the sting are significant in both the voluntariness and abuse of process inquiries. In short, although perhaps not much needs to be made of it, it is possible to become confused by the apparent intertwining of facts, problems and evidentiary issues that an examination of the 'corpus' of Canadian Mr. Big jurisprudence uncovers.

A further obfuscating factor is the fact that the typical Mr. Big sting produces a voluminous quantity of disclosure and data to be dealt with by counsel. This in turn can produce a daunting amount of what might be called 'raw' evidence to be dealt with by the

⁶⁷ Houlahan successfully appealed his conviction but later committed suicide.

⁶⁸ *Oickle*, *supra* note 57.

triers of fact and law at both the preliminary inquiry and at trial. The end result of this situation is that it is often difficult for the legal researcher to feel confident that he or she is really seeing an accurate portrayal of the Mr. Big sting merely by reading judgments that may only be ten or twelve to fifteen or twenty pages in length. Naturally one cannot expect to get an idea of the demeanour of witnesses by reading judgments, but there is also the fact that videotape and audiotape evidence is unavailable for scholarly review. Furthermore, there is much evidence that judges may simply not see fit to mention in voir dire judgments and sentencing decisions. Also significant, of course, is the fact that the majority of these cases are murder cases and heard by a jury. Therefore, in most cases, no reasons regarding how the accused was found guilty beyond a reasonable doubt are available. Furthermore, if defence counsel does not request voir dices at trial, which happens quite a lot more often than one might expect to be the case, it is quite possible that a whole Mr. Big sting murder case can go through the criminal legal system without any record being made of it beyond the trial transcripts.

A striking example of such a case in which almost no detail is available from the reported judgments is *R. v. Skiffington*.⁶⁹ In this appeal the sting is mentioned only briefly and is described cursorily in only one or two paragraphs, mainly in the following excerpt:

In the fall of 1999, the police commenced a sophisticated undercover operation in Newfoundland, and elsewhere, with a view to obtaining a confession from the appellant. The police plan involved a number of undercover officers playing roles as members of a criminal organization which offered the appellant well paid employment on the condition that the crime boss, B.A., another undercover police officer, could be satisfied of the appellant's honesty and trustworthiness. In this context, the appellant was persuaded to confess to B.A. that he murdered

⁶⁹ *Skiffington*, *supra* note 38.

Ms. Martin. The appellant's confession to B.A. was tape recorded, and the jury heard the tape recording and had a transcript of the conversation.⁷⁰

Furthermore, the defence had called no evidence at trial, which of course meant that the accused did not testify.⁷¹ We do know that there were several exculpatory statements made by the accused, both to uniformed officers and an undercover cell plant⁷² as well as to the Mr. Big undercover operatives⁷³, but we do not know what those statements were. We also know from the Court of Appeal's judgment that there existed only a brief window of opportunity for Skiffington to have committed the crime⁷⁴ and that there was no other forensic evidence linking him to the killing other than his confession including no murder weapon.⁷⁵ We also know that Skiffington, like so many other Mr. Big targets, experienced "financial difficulties".⁷⁶ Other than this we know little of the sting on Skiffington other than that it was sophisticated and elaborate, that he was repeatedly told by the fake gangsters that they believed he had killed his wife, and that he was told he could not be trusted unless he admitted it to them. He was also told that he could not be protected from police investigation unless he admitted the crime to Mr. Big.⁷⁷

Based on what *is* known from the Court of Appeal's decision, it seems as though Skiffington's conviction stands on fairly shaky ground. Like the recently exonerated Kyle Unger, Skiffington was known as a person who told lies, and who did in fact lie to Mr. Big in a confession that, according to his counsel, contained inaccuracies and

⁷⁰ *Ibid.* at para. 10.

⁷¹ *Ibid.* at para. 12.

⁷² *Ibid.* *Ibid.* at para. 6.

⁷³ *Ibid.* at para. 26.

⁷⁴ *Ibid.* at para. 7.

⁷⁵ *Ibid.* at para. 5.

⁷⁶ *Ibid.* at para. 42.

⁷⁷ *Ibid.* at para. 34.

inconsistencies.⁷⁸ The question arises: how many other vital Mr. Big facts have been lost for one reason or another due to the vagaries and formalities of the criminal legal system?⁷⁹

Ironically, an investigation of the Mr. Big phenomenon becomes something like a criminal investigation in itself. We see only the traces left behind and have to work to uncover the truth with limited available information. Perhaps, in the interests of scholarship, it would be advisable for someone to run a sting on Mr. Big.

⁷⁸ *Ibid.* at para. 43.

⁷⁹ In the interest of brevity no further cases will be cited with regard to this intriguing sub-topic, however, some other judgments may be of interest to the Mr. Big sting aficionado, including *R. v. McIntyre* 135 N.B.R. 266 (N.B.C.A.) [*McIntyre (C.A.)*], *R. v. Moore* [1997] B.C.J. No. 1569 (B.C.C.A.) [*Moore*], and *R. v. French* (1997) 36 W.C.B. (2d) 254, 98 B.C.A.C. 265 [*French*].

CHAPTER THREE – THE SECTION 7 RIGHT TO SILENCE

An examination of the section 7 right to silence and its application to the Mr. Big sting is a good example of the overlapping of legal issues referred to previously in this thesis. This is mainly because section 7 is also notionally where an accused can attempt to get a remedy under the doctrine of abuse of process. A brief précis of the law in these areas as they relate to Mr. Big can be summarized as follows: Defence counsel in these cases have unsuccessfully attempted to argue that the Mr. Big sting should be held to violate the section 7 right to silence and that the confession evidence obtained thereby should be excluded pursuant to section 24(2). The most obvious reason for the failure of this argument is that the accused in these cases are not detained when the statements are made.

The abuse of process argument has also been made by the defence on the proposition that the police tactics used in Mr. Big stings are so reprehensible that they would shock the conscience of the community if they were widely known. The remedy for this breach of community values should, the defence argues, be the exclusion of the evidence or a judicial stay. This argument has failed at trial and at the provincial appellate level but it has not been completely foreclosed by the Supreme Court of Canada.

The overlapping of issues referred to above becomes apparent from a perusal of the case law, some of which asserts that the abuse of process doctrine has largely been subsumed by section 7. That said, few trial judges comment on this particular legal development and most look at abuse of process as a separate and distinct issue without referring to section 7. Fewer serious section 7 arguments with regard to the right to

silence are made due to the fact that it is generally the weaker argument, and also due to the fact that, although the abuse of process argument never seems to result in exclusion of evidence in Mr. Big cases, there is uniform agreement that it is theoretically possible for the argument to succeed.

The case of *R. v. Osmar*⁸⁰ is probably the leading case with regard to the right to silence under section 7 of the *Charter* and its effect on Mr. Big stings. Both the Trial Judge and the Ontario Court of Appeal considered defence counsel's right to silence arguments in these cases. In the 2001 voir dire decision, the Trial Judge summed up defence counsel's arguments as follows:

23 The defence argues that *R. v. Moore* (1997) 94 B.C.A.C. 281, which has been cited by the prosecution as standing for the proposition that inculpatory statements made during an undercover operation prior to detention, were not protected by Section 7 of the Charter, does not, in fact, go that far. It is submitted that the case only refers to the right to silence, which is a small component of Section 7, and that the accused's right against self-incrimination is a principle of fundamental justice that has now been constitutionalized as the principle against self-incrimination, which the defence states applies in a non-custodial setting. In this regard the defence stresses the case of *R. v. White* (1999) 135 C.C.C. (3d) 257, S.C.C. where the Section 7 issue was whether the admission into evidence, of statements made under compulsion (i.e. statutorily forced), would violate the principle against self-incrimination.

24 According to the defence, Hebert, only dealt with the right to silence because the principle against self-incrimination had not yet developed.

25 In advancing a Section 7 violation of his right against self-incrimination, the accused takes the position that the conduct of the police deprived him of his right to choose to speak, or not to speak, to police officers.⁸¹

Most notably here, defence counsel is attempting to argue that the right to silence under section 7 should, at least in these circumstances, be held to apply even though the

⁸⁰ *Osmar* (Ont. S.C.J.), *supra* note 47, and *Osmar* (C.A.), *supra* note 8.

⁸¹ *Osmar*, *supra* note 47 at paras. 23-25.

accused was not in custody at the time the Mr. Big statements were made. The Trial Judge outlined the defence argument as follows:

77 As a result of answers to questions posed to police officers during their cross-examination on this voir dire, the accused argues that as a result of police conduct, which involved not only an extensive overt surveillance but also the employment of an undercover operation, that he was subjected to a situation akin to detention with the result that his right to silence and his right against self-incrimination were denied. In particular, the accused alleges that he was openly followed by the police on a virtual 24 hour basis with the result that he claimed to be isolated from his friends and family members. In addition, because of the detailed description given out during a press conference on July 21, 1998, as to the suspect in the two murders, the police did everything but actually name him. Because of the intense surveillance the defence submits that Osmar was purposefully inflicted with emotional and psychological trauma, was effectively prohibited from finding work and was alienated from his friends and relatives, thereby being deprived of his right to liberty and security of the person.⁸²

Defence counsel argued that the Mr. Big statements should be excluded pursuant to s. 24(2) as their admission would bring the administration of justice into disrepute. Notably, although eventually dismissed as unpersuasive by the Trial Judge and the Ontario Court of Appeal in *Osmar*, the argument that being a murder suspect had made it difficult for the accused to find legitimate work appears to have been a factor in the wrongful conviction of Kyle Unger, who also was known to be a suspect in his community.

The Trial Judge in this case made a fairly comprehensive response to defence counsel's argument with regard to the alleged breach of the right to silence under section 7:

79 As to whether the police conduct, including the use of trickery, deprived the accused of his constitutional right to silence and the right against self-

⁸² *Ibid.* at para. 77.

incrimination, the starting point in understanding the analysis of the right to silence, in the context of this case, is with the Supreme Court of Canada decision in *R. v. Hebert* where McLachlin J. stated that the right to silence does not apply in the pre-detention stage and does not affect the use of undercover officers prior to detention. The questioning of a suspect, who is not under arrest, although he has indicated that on the basis of legal advice that he does not wish to make a statement, does not violate the right to silence as guaranteed by this section. (See *Regina v. Hicks* [1990] 1 S.C.R. 120)⁸³

One of the more interesting aspects of the *Osmar* judgment is its discussion not only of the section 7 right to silence as traditionally understood, i.e. being effective only when the accused is detained, but also of the principle against self-incrimination. Defence counsel attempted to bring this principle into play as described by the Trial Judge in the above-cited paragraphs 23, 24, 25 and 77. Three judgments were relied upon by the defence at trial in its attempt to explicate the principle as it related to Osmar's situation: Lamer J.'s dissent in *R. v. Jones*⁸⁴ Iacobucci J.'s judgment in *R. v. S. (R.J.)*⁸⁵, and Iacobucci J.'s judgment in *R. v. White*⁸⁶.

One might refer to the principle against self-incrimination, as described by the Canadian courts, as an amorphous and benign common law concept of some antiquity. Iacobucci J. described the principle against self-incrimination as:

An overarching principle within our criminal justice system, from which a number of specific common law and *Charter* rules emanate, such as the confessions rule, and the right to silence, among many others; the principle can also be the source of new rules in appropriate circumstances.⁸⁷

⁸³ *Ibid.* at para. 79.

⁸⁴ [1994] 2 S.C.R. 229, 89 C.C.C. (3d) 353 [*Jones* cited to S.C.R.].

⁸⁵ [1995] 1 S.C.R. 451, 96 C.C.C. (3d) 1 [*S.(R.J.)* cited to S.C.R.].

⁸⁶ [1999] 2 S.C.R. 417, 135 C.C.C. (3d) 257 [*White* cited to S.C.R.].

⁸⁷ *Ibid.* at para. 44.

It is not surprising that defence counsel in *Osmar*'s case would attempt to rely on a broader principle against self-incrimination when attempting to exclude statements made by an accused when not detained, but ultimately the Trial Judge refused to recognize a broader protection against self-incrimination. The Trial Judge noted that Iacobucci J. discussed the existence of the amorphous principle against self-incrimination in *R. v. S. (R.J.)* but even there he recognized that the specific section 7 right to silence as recognized in *Hebert* is only available when the accused is detained. The pertinent parts of Iacobucci J.'s reasoning in this regard are quoted by the *Osmar* Trial Judge at paragraph 84:

84 The principle against self-incrimination under Section 7 is closely linked to the concept of the right to silence. In this context Iacobucci draws on the analysis in *Hebert*. In discussing the limits of the principle, he writes at page 47:

"In post Charter terms other limitations on the principle against self-incrimination are also visible. The right to silence recognized in *Hebert* is not a free-floating right always available, but rather a right which has so far been linked to the concept of detention and moreover it is not a right which is absolute and capable of being discharged only by waiver."⁸⁸

Furthermore, the Trial Judge responded to the argument about the violation of the principle against self-incrimination as follows:

.....

91 The current state of the law is that short of custodial interrogation (i.e. detention), the Section 7 rights of the accused, with respect to his right to silence, are not engaged. *S. (R.J.)* and *White* have not gone so far as to state that Section 7 is engaged prior to detention, because they deal with the issue of state compelled testimony and the Section 7 rights of the accused against such self-incrimination are engaged at the point of compulsion. In the case of testimonial compulsion

⁸⁸ *Osmar (Ont. S.C.J.)*, *supra*, note 47 at para. 84.

this would be at the time of trial; whereas in the case of documentary or bodily compulsion, this could be before trial, at the point where the reports or bodily fluids are compelled. The principle against self-incrimination, if we are to accept the description by Lamer J. in *Jones*, is that it is not triggered until the individual and the state become adversaries in a proceeding. The principle, therefore, does not attach merely because the investigation has focused on the accused as a prime suspect. The principle or right attaches once the government initiates adversarial proceedings, whether by way of a formal charge, detention or where the adverse positions of the state and the accused have solidified. To extend the principle against self-incrimination, prior to the onset of adverse proceedings, would be an overreaching application of Section 7 Charter rights. Even *Miranda* in the U.S., which relied on the Fifth Amendment against self-incrimination, refers to custodial interrogations as opposed to non-custodial interrogations at the police station.⁸⁹

From the above quotation it seems clear that just as detention is required to give rise to the section 7 right to silence *simpliciter*, the “onset of adverse proceedings” is required to bring to life the principle against self-incrimination or alternately, a ‘solidification’ of the adverse positions of the individual of the state. It is submitted that the already nebulous definition of detention seems less uncertain than the even less well-formed ‘solidification of adverse positions’ referred to here.

In any event, the Trial Judge dismissed the argument of defence counsel, who made substantially the same argument at the Ontario Court of Appeal, this time relying on the Supreme Court cases of *R. v. Turcotte*,⁹⁰ *R. v. Hodgson*,⁹¹ and, again, *R. v. White*.⁹²

As an initial statement of the law, the Court of Appeal noted that the weight of previous decisions favoured the admission of Mr. Big statements under both the

⁸⁹ *Ibid.* at para. 91.

⁹⁰ 2005 SCC 50, [2005] 2 S.C.R. 519 [*Turcotte*]

⁹¹ *Hodgson*, *supra* note 60

⁹² *White*, *supra* note 86.

common-law voluntariness rule, as well as the right to silence under section 7 of the *Charter*.⁹³ They do, however, acknowledge the defence's argument, describing it thusly:

In an interesting argument, Mr. Campbell, on behalf of the appellant, argues that our understanding of the right against self-incrimination has evolved so that physical detention is no longer required to trigger the constitutionally protected right to silence. Accordingly, he submits that the appellant's statements to the police officers were inadmissible under the *Charter*.⁹⁴

Defence counsel made other arguments relating to expert opinion evidence but they will be considered in a different portion of this thesis.

After going through the facts of the case and the evidence presented at trial, the Court of Appeal again opined that the weight of the Canadian law on section 7 of the *Charter* would seem to be against excluding the statements made by Osmar. However, they acknowledge the Appellant's argument:

[25] Two decisions from the Supreme Court of Canada would seem to be insurmountable barriers to the success of this ground of appeal. In *R. v. Hebert*, the Supreme Court of Canada held that the right to silence guaranteed by s. 7 of the *Charter* is not infringed by undercover police operations where the suspect is not detained. Then, in *R. v. McIntyre* [1994] 2 S.C.R. 480, the court affirmed the application of *Hebert* in a Mr. Big-type case. The appellant seeks to avoid the impact of these cases by arguing that more recent decisions of the Supreme Court have held that s. 7 is implicated whenever the state seeks to use self-incriminating evidence by coercive methods. He argues that trickery combined with elicitation can amount to coercion and that there is no requirement of detention.⁹⁵

First the Court considered *Hodgson*, which, according to them, did not help the Appellant's case. The Court of Appeal noted that *Hodgson* was not a *Charter* case and

⁹³ *Osmar (C.A.)*, *supra* note 8 at para. 3.

⁹⁴ *Ibid.* at para. 4.

⁹⁵ *Ibid.* at para. 25.

in fact the Supreme Court in that case cited portions of Hebert which seem to support the detention requirement:

Admittedly, *Hodgson* was not a *Charter* case. However, the court referred to and quoted from *Hebert*, including, at para. 22, this passage from p. 32 of *Hebert*:

... one of the themes running through the jurisprudence on confessions is the idea that *a person in the power of the state's criminal process has the right to freely choose whether or not to make a statement to the police.* This idea is accompanied by a correlative concern with the repute and integrity of the judicial process. This theme has not always been ascendant. Yet, its importance cannot be denied. It persists, both in Canadian jurisprudence and in the rules governing the rights of suspects in other countries. [Emphasis added.]⁹⁶

Next the Court of Appeal considered *White*, in which the admission of statements made under statutory compulsion by a motorist at a roadside stop had been ruled to be contrary to section 7. This case is important in that the Supreme Court of Canada affirmed the existence of the principle against self-incrimination and its nature as “over-arching” and “emanating”. However, the Ontario Court of Appeal further considered the necessity of the examination of the context of the contact between the state and the individual that is necessary to determine whether the right not to incriminate oneself has been violated:

[32] In *White*, Iacobucci J. examined four contextual factors that led him to find that use of statements made under statutory compulsion from provincial traffic legislation violated s. 7. Those factors were [firstly] the existence of coercion, [secondly] an adversarial relationship producing “a context of pronounced psychological and emotional pressure” (para. 58), [thirdly] the real possibility of an unreliable confession to a person in authority “whose authority and physical presence might cause the driver to produce a statement in circumstances where he or she is not truly willing to speak” (para. 62), and [fourthly] abuse of power...⁹⁷

⁹⁶ *Ibid.* at para. 28.

⁹⁷ *Ibid.* at para. 32.

The Court of Appeal then goes on to find that there is no violation of the principle because there was little to no coercion involved in this particular incarnation of the sting, in which the target was actively seeking a job in the fictitious criminal organization. In part the Court of Appeal relies here on previous findings made by the lower courts that the target was not as hard up to find employment as he claimed and that he was not as emotionally affected by the intense surveillance as he claimed.⁹⁸

The Court of Appeal further found that although an adversarial relationship existed there was “no pronounced psychological or emotional pressure”⁹⁹ in evidence such as to raise the second contextual factor identified by Iacobucci J. in *White*.

As far as the third and fourth factors are concerned, the Court of Appeal, in a curious move, appears to conflate them for no apparent reason:

[36] Finally, this example of the Mr. Big strategy does not contain the elements of a real possibility of an unreliable confession because of abuse of power by a person in authority. There was no abuse of power. The appellant was presented with an opportunity to obtain employment in a criminal organization, but he was not threatened or intimidated. Even if it is possible to apply the *White* analysis to this case, the evidence and the findings of fact by the motion judge undermine any claim to a violation of s. 7.¹⁰⁰

It likely makes no difference whether abuse of power, the fourth consideration, is considered separately from the third consideration of whether or not a statement is reliable when made to a person in authority under circumstances where the authority and the physical presence of the receiver of the statement may result in an overborne

⁹⁸ *Ibid.* at para. 34.

⁹⁹ *Ibid.* at para. 35.

¹⁰⁰ *Ibid.* at para 36.

unwillingness to speak. That said, the conflation of the two issues does seem to detract from clarity in the analysis.

Having found that the contextual factors in *White* had not been present or sufficiently present in *Osmar*'s case, the Court of Appeal ruled that the police activity in the latter case did not violate the section 7 right to silence or, presumably, the larger principle against self-incrimination which still may operate when an accused is not under detention.

As far as *Turcotte* was concerned, its relevance was denied by the Court of Appeal because the issue it dealt with was whether or not an accused's silence could be used against him at trial. *Osmar* was ruled to be different because in that case the accused gave up his right not to speak.¹⁰¹

After having met defence counsel's arguments with regard to *Hodgson*, *White*, and *Turcotte*, the Court of Appeal turned to what is clearly the controlling case in regard to the section 7 right to silence as it pertains to undercover operations in Canada: *R. v. Hebert*. They cite the relevant passage:

[41] Justice McLachlin went on at p. 41 of *Hebert* to specifically address the issue raised by this case, the use of undercover police officers to elicit statements from a suspect who is not detained:

Secondly, it applies only after detention. *Undercover operations prior to detention do not raise the same considerations. The jurisprudence relating to the right to silence has never extended protection against police tricks to the pre-detention period. Nor does the Charter extend the right to counsel to pre-detention investigations.* The two circumstances are quite different. *In an undercover operation prior to detention, the individual from whom information is sought is not in the control of the state. There is no need to protect him from the greater power of the state. After detention, the situation is quite different; the state takes control and assumes the*

¹⁰¹ *Ibid.* at para. 39.

responsibility of ensuring that the detainee's rights are respected.
[Emphasis added.]

[42] It may be that the right to silence recognized in *Hebert* could be extended to a case where the accused, although not in detention, was nevertheless under the control of the state in circumstances functionally equivalent to detention and equally needing protection from the greater power of the state. But that is not this case. This appellant was not under the control of the state nor was the context such as to require that he be protected from the greater power of the state. The appellant's assertion that elicitation and trickery are sufficient to require *Charter* scrutiny is not supportable by the authorities or by a reasoned extension of the principles in those cases.¹⁰²

The judgment in *Hebert* really does seem to close the door on a section 7 right to silence argument in Mr. Big cases as McLachlan J. clearly singles out undercover police operations as being exempt from its operation. The Court of Appeal also cited the one paragraph-long Supreme Court case of *R. v. McIntyre*, which dealt with a set of facts somewhat similar to those in *Osmar*:

[McIntyre] argues that his statements made to undercover police officers after he had been released but while he was still the subject of a murder charge are inadmissible under ss. 7 and 24(2) of the *Canadian Charter of Rights and Freedoms*. We share the view of the majority that the accused was not detained within the meaning of *Hebert* and *Broyles*. Furthermore, the tricks used by the police were not likely to shock the community or cause the accused's statements not to be free and voluntary. The appeal is dismissed.¹⁰³

The Supreme Court's ratio in *McIntyre* is not without its persuasive appeal, especially with regard to the right to silence and the detention factor. However, we will argue later in this thesis that, in relation to tricks and community shock, its significance may be

¹⁰² *Ibid.* at paras. 41 to 42.

¹⁰³ [1994] 2 S.C.R. 480, 153 N.B.R. (2d) 161 at para. 1 [*McIntyre* (S.C.C.) cited to S.C.R.].

seriously over-emphasized and its value as stare decisis highly overestimated in Mr. Big cases. The Ontario Court of Appeal then opined as follows:

[47] The entire court, including McLachlin J., sat on *McIntyre*. The issue of detention cannot be regarded as *obiter* in that case. I do not think it open to this court to reject the detention requirement for this aspect of the right to silence under s. 7. I would not give effect to the appellant's *Charter* argument.¹⁰⁴

It is clear from *Osmar* that the section 7 right to silence and the nebulous principle against self-incrimination from which it emanates will be no defence against the admission of evidence in Mr. Big stings in Canada. That said, there is no question that the principle against self-incrimination is ever-present in any case in which the state attempts to use an accused's statements against him or her in court. Furthermore, after reflection upon the corpus of jurisprudence relating to Mr. Big in Canada, one wonders exactly how far the undercover team would have to go in order to give rise to circumstances "functionally equivalent to detention" as referred to by the Ontario Court of Appeal in *Osmar*.¹⁰⁵ For example, picture a target in a hotel room in downtown Vancouver, a city that may be unfamiliar to him. He is behind a locked door, being questioned by a crime boss who, as far as the target knows, is functionally equivalent to Maurice Boucher of the Hells Angels or Vito Rizzuto of Cosa Nostra, and he knows the crime boss's henchmen are nearby. He has been repeatedly told that he can leave whenever he wants, but he may well have witnessed what appeared to be the violent beating or murder of an operative who has displeased the boss. Answers are being

¹⁰⁴ *Osmar*, *supra* note 8 at para. 47.

¹⁰⁵ *Ibid.* at para. 42.

demanded of him. The question arises, if these are not circumstances functionally equivalent to detention, then what are?

CHAPTER FOUR – ABUSE OF PROCESS

Abuse of process, when examined as a distinct issue in the Mr. Big scenario, presents a much less abstract problem than that posed by the section 7 right to silence. As previously stated, most judges tend to consider abuse of process separately from the *Charter* right to silence although they seem to co-exist in the same legal space.

Interestingly, a perusal of the cases gives the reader the impression that abuse of process is the doctrine of law that gives an accused the best chance of successfully convincing a court/finder of law to exclude Mr. Big confession evidence. All levels of courts agree that it is possible for an accused to do so. Ironically, however, it may be in relation to abuse of process that one is struck by the most illogical pronouncements and palpable unfairness in the judicial considerations of the sting at both trial and appeal levels.

Defining the abuse of process argument in relation to the Mr. Big sting is a relatively straightforward affair. The argument goes that police tactics in the sting are so inappropriate, extreme and distasteful that they wind up shocking the community, or, as some would modify that criterion, right-thinking or informed members of the community. The traditional remedy for an abuse of process under the common law is a stay of proceedings, however, as noted in *R. v. Caster*,¹⁰⁶ this is no longer necessarily the case. At paragraph 13 of that case, the British Columbia Court of Appeal cited the Supreme Court of Canada:

¹⁰⁶ 2001 BCCA 633, 159 CCC (3d) 404 [*Caster*].

[13] The remedy for abuse of process was traditionally a stay of proceedings. With the convergence of the *Charter* and the abuse of process doctrine has come a recognition that the balancing of individual and societal interests requires a consideration of lesser remedies as well. In other words, a stay of proceedings is not the only appropriate remedy in cases involving both the integrity of the justice system and the rights of an individual accused. At para. 69 in *O'Connor*, *supra*, L'Heureux-Dubé J. explained:

... It is important to recognize that the *Charter* has now put into judges' hands a scalpel instead of an axe -- a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system.¹⁰⁷

Defence counsel, as a result of the above ruling, have the opportunity to seek less extreme remedies than a stay of proceedings in the murder cases in which Mr. Big Stings have almost exclusively been used. However, success has been equally elusive whether a stay is sought or only an exclusion of evidence or even parts of evidence.

The current law of abuse of process in the Mr. Big context may have been canvassed most thoroughly and clearly by Allbright J. in the relatively recent case of *R. v. Hathway*. Hathway had raised numerous arguments for exclusion of his confession in pre-trial motions but Allbright J. ruled that a voir dire would only be conducted in relation to the abuse of process argument. Initially Allbright J. stated that the standard for determining whether or not an abuse of process had occurred, either at common law or under the *Charter*, would be that of a balance of probabilities.¹⁰⁸

In paragraphs 133 to 135 and 138 of Allbright J.'s judgment, he lays out the salient Canadian jurisprudence as follows:

[133] The seminal case in Canada dealing with a consideration of abuse of

¹⁰⁷ *Ibid.* at para. 13.

¹⁰⁸ *Hathway*, *supra* note 9 at para. 132.

process is the Supreme Court's commentary in *R. v. Jewitt*, [1985] 2 S.C.R. 128. Commencing at page 131, the Court observed:

Abuse of Process

Before considering whether a stay of proceedings is a judgment or verdict of acquittal or tantamount thereto, it is necessary to determine whether, at common law, a discretionary power to stay proceedings in a criminal case for abuse of process exists, in the words of Laskin C.J. in *Rourke v. The Queen*, [1978] 1 S.C.R. 1021, as a means of "controlling prosecution behaviour which operates prejudicially to accused persons" (p. 1034).

The inherent jurisdiction of a superior court to stay proceedings which are an abuse of its process was recognized in Canada as early as 1886, in the case of *In re Sproule* (1886), 12 S.C.R. 140. In recent years, however, uncertainty has clouded the question whether Canadian courts, apart from powers given to the Attorney General under s. 508 of the *Criminal Code*, have a discretion to stay proceedings for abuse of process. ...

[134] The Court further observed at pages 136-137:

It seems to me desirable and timely to end the uncertainty which surrounds the availability of a stay of proceedings to remedy abuse of process. Clearly, there is a need for this Court to clarify its position on such a fundamental and wide-reaching doctrine.

...

I would adopt the conclusion of the Ontario Court of Appeal in *R. v. Young* [(1984), 40 C.R. (3d) 289] and affirm that "there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings". I would also adopt the caveat added by the Court in *Young* that this is a power which can be exercised only in the "clearest of cases".¹⁰⁹

¹⁰⁹ *Ibid.* at paras. 132 to 134.

At paragraph 135 Allbright J. further adverted to the Supreme Court of Canada's unanimous decision in *R. v. Grandinetti* in which Abella J. seems to affirm the appropriateness of an abuse of process inquiry in a case involving sophisticated undercover operations:

36 There is no doubt, as the Court observed in *Hodgson*, at para. 26, that statements can sometimes be made in such coercive circumstances that their reliability is jeopardized even if they were not made to a person in authority. The admissibility of such statements is filtered through exclusionary doctrines like abuse of process at common law and under the *Canadian Charter of Rights and Freedoms*, to prevent the admission of statements that undermine the integrity of the judicial process. The “abuse of process” argument was, in fact, made by Mr. Grandinetti at trial, but was rejected both at trial and on appeal, and was not argued before us.¹¹⁰

Interestingly, Abella J. here seems to identify abuse of process as both a common law and a *Charter* doctrine without saying one is subsumed by the other.

At paragraph 138 of *Hathway*, Judge Allbright opined that “[t]hese two decisions [*Jewitt* and *Grandinetti*] of the Supreme Court of Canada provide the basic framework for consideration of whether, in the unique circumstances of this “Big Boss” sting operation, Project Erlina, the applicant has demonstrated an abuse of process.”¹¹¹

From the above quotations, the abuse of process argument can arguably be reduced to a few points: firstly, it is a means for controlling prosecution behaviour which operates prejudicially to accused persons; secondly, courts have an inherent jurisdiction to stay proceedings which are an abuse of process; thirdly, an abuse of process occurs when actions that bring an accused to court violate fundamental principles of justice which underlie the community's sense of fair play and decency; fourthly, proceedings

¹¹⁰ *Grandinetti*, *supra* note 2 at para. 36.

¹¹¹ *Hathway*, *supra* note 9 at para. 138.

that come about as a result of those actions are oppressive and vexatious; fifthly, the discretion should only be exercised in the clearest of cases; sixthly, abuse of process acts as a filter and can be argued in Mr. Big type cases.

However, what remains to be determined is what exactly the police or state agents have to do in order for an abuse of process to arise. Allbright J. again cites the Supreme Court of Canada in the following passage:

[143] At the root of the matter before me is that allegation that the conduct of the authorities in Project Erlina amounts to an abuse of process such that it would shock the community. In considering the doctrine of abuse of process and its inherent tests (as articulated in *R. v. Jewitt, supra*), the Supreme Court of Canada, prior to its decision in *R. v. Jewitt*, commented upon the practical application of the abuse of process doctrine in a fashion relevant to this application. This commentary is found in *R. v. Rothman* [1981] 1 S.C.R. 640. At pages 696–697, Lamer J. offered the following observations on the principle:

... Therefore the rules regarding the admissibility of statements by an accused to persons in authority may be enunciated in the following manner:

1. A statement made by the accused to a person in authority is inadmissible if tendered by the prosecution in a criminal proceeding unless the judge is satisfied beyond a reasonable doubt that nothing said or done by any person in authority could have induced the accused to make a statement which was or might be untrue;
2. A statement made by the accused to a person in authority and tendered by the prosecution in a criminal proceeding against him, though elicited under circumstances which would not render it inadmissible, shall nevertheless be excluded if its use in the proceedings would, as a result of what was said or done by any person in authority in eliciting the statement, bring the administration of justice into disrepute.

I would emphasize that under the above mentioned second rule the judge is not exercising a pure discretion to exclude, as is the case under s. 178.16(2) of the *Criminal Code*, and that his finding is to be dealt with in appeal as any other finding, subject to the differences and limits of the Appeal Court's jurisdiction as defined by ss. 603 and 605 of the *Criminal Code*.

I hasten to say also that, if the second portion of the rule is not a true discretion, it is even less a blanket discretion given judges to repudiate through an exclusionary rule any conduct on the part of the authorities a given judge might consider somewhat unfortunate, distasteful or inappropriate. There first must be a clear connection between the obtaining of the statement and the conduct; furthermore that conduct must be so shocking as to justify the judicial branch of the criminal justice system in feeling that, short of disassociating itself from such conduct through rejection of the statement, its reputation and, as a result, that of the whole criminal justice system, would be brought into disrepute.

The judge, in determining whether under the circumstances the use of the statement in the proceedings would bring the administration of justice into disrepute, should consider all of the circumstances of the proceedings, the manner in which the statement was obtained, the degree to which there was a breach of social values, the seriousness of the charge, the effect the exclusion would have on the result of the proceedings. It must also be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community. That a police officer pretend to be a lock-up chaplain and hear a suspect's confession is conduct that shocks the community; so is pretending to be the duty legal-aid lawyer eliciting in that way incriminating statements from suspects or accused; injecting Pentothal into a diabetic suspect pretending it is his daily shot of insulin and using his statement in evidence would also shock the community; but generally speaking, pretending to be a hard drug addict to break a drug ring would not shock the community; nor would, as in this case, pretending to be a truck driver to secure the conviction of a trafficker; in fact, what would shock the community would be preventing the police from resorting to such a trick.¹¹²

Allbright J.'s invocation of the above examples of acceptable and unacceptable police conduct from *Rothman* is a common hallmark of Canadian judgments in Mr. Big cases.

Although the actual words "abuse of process" are not used anywhere by the Supreme Court of Canada in *Rothman*, the case has become central in abuse of process

¹¹² *Ibid.* at para. 143.

jurisprudence in Canada. Especially important in that regard is the final paragraph cited, wherein the court avails itself of both metaphor and of concrete examples to make its point.

The judgment states that the job the police have in investigating serious crimes is no game. It ought not to be and is not governed by the “Marquess of Queensberry rules”. The police are dealing with shrewd and sophisticated adversaries and the imposition of “the rule” upon them¹¹³ in their work will only hamper them. In determining whether or not admission of a statement would bring the administration of justice into disrepute a court ought to consider all the circumstances of the proceedings, the manner in which the statement is obtained, existence and degree of a breach of social values, how serious the charge is and the effect the exclusion of the statement would have on the result of the proceeding.

It is submitted that it is worthwhile repeating these oft-quoted ideas in a slightly different form in order to de-familiarize them and make them amenable to fresh examination.¹¹⁴

The Supreme Court gives some concrete examples at the end of the cited passage as to what conduct would shock the community so much as to bring our system into disrepute:

1. A police officer pretending to be a chaplain in order to get a suspect to confess
2. A police officer pretending to be a lawyer in order to get a suspect to confess

¹¹³ i.e. the police

¹¹⁴ Similarly, it is also submitted that it is useful to think about what exactly is meant by the metaphorical use of the term ‘Marquess of Queensberry rules’: actually, they are rules for boxing.

3. Injecting a diabetic with sodium pentothal, under the pretense that it is actually insulin, in order to get a suspect to confess

Two other concrete examples, which are posited by the court as more than acceptable methods to elicit incriminating statements are

4. A police officer pretending to be a hard drug addict in order to break a drug ring

5. A police officer pretending to be a truck driver in order to secure the conviction of a trafficker

These examples are referred to as being more than acceptable because the Supreme Court states quite clearly that it would in fact be exclusion of confession evidence in such cases, and obtained through such tactics, that would shock the community, not its admission.

‘Community Shock’ is a standard phrase encountered in abuse of process jurisprudence. So too is ‘dirty trick’. The dirty trick is juxtaposed with what might be called normal tricks and acceptable deceitfulness. The dirty trick was first defined by the Supreme Court of Canada in *R. v. Collins*:

I would agree with Howland C.J.O. in *Simmons, supra*, that we should not gloss over the words of s. 24(2) or attempt to substitute any other test for s. 24(2). At least at this early stage of the *Charter's* development, the guidelines set out are sufficient and the actual decision to admit or exclude is as important as the statement of any test. Indeed, the test will only take on concrete meaning through our disposition of cases. However, I should at this point add some comparative comment as regards the test I enunciated in *Rothman, supra*, a pre-*Charter* confession case dealing with the resort to "tricks", which was coined in the profession as the "community shock test". That test has been applied to s. 24(2) by many courts, including the lower courts in this case. I still am of the view that the resort to tricks that are not in the least unlawful let alone in violation of the *Charter* to obtain a statement should not result in the exclusion of a free and voluntary statement unless the trick resorted to is a dirty trick, one that shocks the community. That is a very high threshold, higher, in

my view, than that to be attained to bring the administration of justice into disrepute in the context of a violation of the *Charter*.¹¹⁵

Clearly the dirty tricks question is part of the community shock doctrine first enunciated in *Rothman*.

Of course the fact that the abuse of process argument appears in most ways to have merged with section 7 of the *Charter* makes the law somewhat unclear on some levels. However, this lack of clarity would seem to be functionally moot, as *voir dire* judges and appellate panels universally expend no time at all parsing the importance of L'Heureux-Dube J.'s judgment on this issue in *R. v. O'Connor*. Canadian judges tend to focus only on what could be called the meatier questions of the existence of dirty tricks and resulting community shock. In any event, what the case law does make clear is that the tactics used in Mr. Big stings do not meet the test prescribed to constitute an abuse of process, i.e. they do not violate the community's sense of fair play and decency.

In the first chapter of this thesis many examples of the tactics used in Mr. Big stings were outlined. Some of the tactics might at first glance seem to have the capacity to shock members of the Canadian community. However, judges have never once ruled against the Crown and found the police to have played a dirty trick on a target.

Clearly the question of threats of violence perceived by the target is usually foremost in the mind of defence counsel in considering whether an abuse of process argument may be successful. The continually occurring insinuations and implications to the target that the criminal gang is prone to violent and murderous solutions to protect its interests are major aspects of most operations. The degree to which coercion and

¹¹⁵ [1987] 1 S.C.R. 265, 33 C.C.C. (3d) 1 at para. 41 [*Collins* cited to S.C.R.].

pressure are brought to bear on individual targets varies, but in those cases where they are used the police never seem to cross the line which would place them within the realm of community shock. Of course the ‘violent scenario’ as we have termed it, is especially contentious in this regard.

The violent scenario, which, it has previously been noted, is also sometimes referred to as the “Toni scenario”, figures significantly in many abuse of process cases. Sometimes its implication/use is only referred to in the judgments, leaving the reader to guess at how intense it may have been and the effect it may have had on the target. This was the case in *R. v. Bonisteel*.¹¹⁶ Some of the details given by Bonisteel to Mr. Big were argued by the defence to have been provided to him.¹¹⁷ Some of the details seem generic, e.g. his statement that there was a lot of blood; or unrealistic, e.g his assertion that he had stabbed the first of the two victims and left the knife in her for five minutes while the second victim made no attempt to escape.¹¹⁸ Bonisteel argued that he was fearful of being killed or hurt by ‘Buck’, the crime boss:

[24] The appellant testified that he made the false confession because he was afraid that Buck would harm him if he did not. During cross-examination, Crown counsel asked the appellant why he did not deny killing the girls during the October 26 interview. The appellant explained that he had already told Buck he had no involvement in the murders, but “Buck wasn’t listening to that, apparently. ... The only thing Buck wanted to hear was what Buck wanted to hear, and that’s exactly what I told him.” He said that Buck was a “dangerous guy”, and he was afraid he would be beaten or killed if he did not tell him what he wanted to hear. Later in the cross-examination, the appellant said he was “well aware of the fact that ... there’s some similarities between what happened to Toni ... and what’s going on [with me and Buck] in that room.”¹¹⁹

¹¹⁶ *Bonisteel*, *supra* note 33.

¹¹⁷ i.e. to Bonisteel.

¹¹⁸ *Bonisteel*, *supra* note 33 at para. 23.

¹¹⁹ *Ibid.* at para. 24.

In his appeal Bonisteel argued community shock. The Court of Appeal disagreed:

[90] The Ontario Court of Appeal considered a similar argument in *Osmar* (at para. 48). It referred to *R. v. McIntyre*, [1994] 2 S.C.R. 480, where the Supreme Court of Canada, in brief oral reasons, dismissed an appeal from the New Brunswick Court of Appeal, stating, among other reasons, that “[t]he tricks used by the police were not likely to shock the community or cause the accused’s statements not to be free and voluntary”. Justice Rosenberg found that the decision of the Supreme Court in *McIntyre* directly met the appellant’s argument that the strategy employed by the police would shock the community, as the facts in *McIntyre* were no worse than the circumstances in *Osmar* yet the Supreme Court held they would not likely shock the community.

[91] There are aspects of this case that arguably may be “worse” than *McIntyre* and *Osmar*. There was nothing in Rosenberg J.A.’s description of those undercover operations that included a beating such as was staged in the “Toni” scenario, nor is there any reference to significant financial inducements, such as the prospect of obtaining \$80,000 after performing a job for the gang.

[92] Do those facts put this case in a different category – that of police tactics that shock the community? I would say no. The cases that have considered Mr. Big scenarios demonstrate a range of tactics. In *Roberts*, for example, the undercover police, in the presence of the appellant, threatened a man and his pregnant wife (both undercover officers) with serious harm if they did not come up with a sum of money. These tactics do not reach the “appalling” examples described in *Oickle*.

[93] I agree with Rosenberg J.A. who said in *Osmar* (at para. 48):

I should not be taken as holding that the manner in which the Mr. Big strategy is executed could never shock the conscience of the community and lead to exclusion on common law grounds. However, the facts of this case do not meet that test.¹²⁰

A few salient features can be drawn from the above citations. Firstly, the police tactics identified earlier as the violent scenario and the payday promise definitely featured in Bonisteel’s case. We don’t know how graphic and egregious the actual circumstances

¹²⁰ *Ibid.* at paras. 90 to 93.

were. i.e. was there an actual fake beating witnessed by the target, was a gun pointed at the ersatz victim, were his or her children or spouses threatened, was he or she bound and gagged and/or thrown in the trunk of a car, et cetera? We also know that 80,000 dollars were a “prospect” for Bonisteel.

We also see the British Columbia Court of Appeal making a comparison between the facts of this case and the facts in other Mr. Big cases. This is a common feature of the judgments. Bonisteel’s experience is ruled to be worse than those employed in *McIntyre* and *Osmar* but not as bad as those employed in *Roberts*. Comparisons like these are expected and useful in a common law jurisdiction, but in the Mr. Big context they are of little practical value since no threshold for excluding Mr. Big evidence has ever been passed or even determined.

A final, and possibly most important feature to be commented on is the British Columbia Court of Appeal’s reliance on the judgment in *R. v. McIntyre*.¹²¹ This case was previously referred to in the above section dealing with the right to silence. However, its import becomes much more contentious in a straightforward abuse of process argument. The unanimous judgment of the Supreme Court of Canada from McIntyre’s appeal as of right is indeed brief, only one paragraph long:

GONTHIER J. -- The appellant argues that his statements made to undercover police officers after he had been released but while he was still the subject of a murder charge are inadmissible under ss. 7 and 24(2) of the *Canadian Charter of Rights and Freedoms*. We share the view of the majority that the accused was not detained within the meaning of *Hebert* and *Broyles*. Furthermore, the tricks used by the police were not likely to shock the community or cause the accused's statements not to be free and voluntary. The appeal is dismissed.¹²²

¹²¹ *McIntyre* (S.C.C.), *supra* note 103.

¹²² *Ibid.* at para. 1.

Many Mr. Big judgments cite this Supreme Court judgment as authority for rulings that Mr. Big does not run afoul of the Canadian abuse of process doctrine. In our view, however, this is a questionable conclusion for the following reasons. As previously stated, Mr. Big stings as they have come to be known today originated in British Columbia. Specifically, the first case to reach the courts may have been *R. v. Raza*¹²³ in 1998. In this regard it is notable that *McIntyre* was a New Brunswick case with the sting itself occurring in 1990, roughly seven years before the ‘classic’ Mr. Big cases started in British Columbia.

All we know of the *McIntyre* sting comes from the New Brunswick Court of Appeal judgment. We know the operation was called *Project Javelot*. We know that the accused was befriended by an undercover operator while in lockup. Upon release he was again contacted by the undercover operator. We know that he was made to believe he could join a criminal gang involved in tobacco, prostitution and guns as long as he could prove that he could kill if necessary. We know he at first refused to talk about his past but ultimately admitted killing the victim.¹²⁴

However, there are a number of aspects that appear to be different. Most Mr. Big stings take a few months to unfold. *McIntyre* confessed after ten days. There is no evidence that any of the familiar scenarios were used on *McIntyre*. Of real significance is the fact that we cannot tell from the Court of Appeal’s brief summary of the facts whether *McIntyre* was merely approached with the possibility of joining a gang or if he was, like targets in classic Mr. Big cases, given an ‘associate’-role from the start. We don’t know

¹²³ *Raza*, *supra* note 40.

¹²⁴ *McIntyre (C.A.)*, *supra* note 79 at pp. 9-10

if he was given minor tasks like moving cars or depositing large sums of cash at a bank or being a lookout or a passive participant in a staged beating. The overwhelming majority of Mr. Big targets are already enmeshed in what they believe to be criminal activity before they are pressured by Mr. Big to confess. They have been paid handsomely for committing fake crimes, they are dependent on the gang, they have developed emotional bonds with the officers targeting them, they have literally been wined and dined, had new clothes purchased for them and promised an exciting and prosperous new life. This is unlikely to have been the case with McIntyre as the whole operation targeting him apparently began on October 2, 1990 and ended on October 12 with his arrest.¹²⁵ Classic Mr. Big stings, due to their generally longer time frames and greater sophistication, must obviously result in more pressure to confess being brought to bear on a target than may have been put on McIntyre.

All of the above being the case, it is arguably highly unsafe to rely on the one paragraph judgment of the Supreme Court as firm authority that Mr. Big stings should not generally be held to be an abuse of process. Based on what we know about it, *McIntyre* should probably not be classified as a Mr. Big sting. It should certainly not be relied upon as binding stare decisis for the proposition that Mr. Big stings are not subject to abuse of process arguments. Unfortunately, a number of Mr. Big judgments have relied on it to admit evidence without taking into account any of the qualifications listed above. These cases include *R. v. Riley*,¹²⁶ *R. v. Hart*,¹²⁷ *R. v. French*,¹²⁸ *R. v.*

¹²⁵ *Ibid.*

¹²⁶ 2001 BCSC 1407, 52 W.C.B. (2d) 47 [*Riley*].

¹²⁷ 2007 NLTD 74, 265 Nfld. and P.E.I.R. 266 [*Hart (voir dire)*].

¹²⁸ *French*, *supra* note 79.

McCreery,¹²⁹ *R. v. Osmar*,¹³⁰ *R. v. Terrico*,¹³¹ *R. v. Ashmore*,¹³² *R. v. Redd*,¹³³ and the previously cited *R. v. Hathway*.¹³⁴

Besides *Bonisteel*, the use of the violent scenario was used and ruled by a voir dire judge not to be an abuse of process in *O.N.E.*¹³⁵ The scenario was summarized as follows by E.R.A. Edwards J.:

[33] The targets had been briefly introduced to another undercover officer, M., during one of the feigned drug deals. Subsequently, on January 28, 1999, K.K. pretended to be so angry with M., who he suspected of being a “rat”, that the targets were visibly disturbed and afraid he might be angry with them. They were assured he was not.

[34] K.K. sent J.B. to get a “piece and muffler” [gun and silencer]. J.B. showed it to J.K. who was “scared” by it and told J.B., who also acted scared, that she hoped K.K. wasn’t going to use it. J.B. then telephoned O.N.E. who was with K.K. and told her she had the “piece and muffler” which J.B. then delivered to K.K.

[35] K.K. took O.N.E. with him to meet M. The gun was in the car with them in an envelope so O.N.E. never saw it, but realized what it was from J.B.’s call. K.K. told her to get out of the car and angrily told M to get in. He then administered what appeared to O.N.E. to be a vicious beating to the supposed “rat” M, leaving him at the road side.

[36] O.N.E. told K.K. she was impressed with his apparent ability to beat the much larger M. She told K.K. she had wrongly been accused of beating another inmate in an institution and would beat women for him if he had any qualms about doing so. She told K.K. she would “take a bullet” for him.

[37] K.K. agreed on cross-examination this scenario was intended to show O.N.E. that the criminal organisation would resort to deadly force to deal with

¹²⁹ 33 W.C.B. (2d) 39, [1996] B.C.J. No. 2403 (S.C.) [*McCreery S.C.*].

¹³⁰ *Osmar (C.A.)*, *supra* note 8.

¹³¹ *Terrico*, *supra* note 11.

¹³² 2011 BCCA 18, 267 C.C.C. (3d) 108 [*Ashmore*].

¹³³ 43 W.C.B. (2d) 62, 1999 B.C.J. 1471 (B.C.S.C.) [*Redd*].

¹³⁴ *Hathway*, *supra* note 9.

¹³⁵ *O.N.E.*, *supra* note 13.

persons who betrayed it and that O.N.E. might assume that she would be beaten if she “fucked around with”, that is, displeased him or S.D.¹³⁶

O.N.E. was 16 and 17 years old at the time the sting was run on her. E.R.A. Edwards J. ruled as follows on the abuse of process issue:

[75] Defence counsel argued that the techniques used, when applied to a “young person” as defined by the *Young Offenders Act*, were such as to amount to an “abuse of process” which would “shock” the conscience of the community, that they violate s. 7 of the *Charter* and that the statements obtained using these techniques are therefore inadmissible.

[76] This argument has been rejected in cases involving the use of substantially similar undercover techniques, including *USA v. Burns and Raffay* [sic], (1997), 117 C.C.C. (3d) 454, where the targets of the undercover operation were age 19.

[77] In *Burns*, Hollinrake JA quoted the earlier decision of the Court of Appeal in *R. v. Roberts* 147 W.A.C. 147 wherein Hall JA for the Court could “... discern no improper coercion or force applied by the [undercover] police to make [the target] confess” despite argument the “conduct of the police portraying themselves as hardened criminals prepared to make threats of death...[which] was calculated to and did terrify the [target] into making false statements about his criminal activity”.

[78] Hollinrake JA noted in *Burns* at paragraph 26 the appellants’ argument that “they were put in a situation that was designed to be coercive” by the techniques used by the undercover officers, but concluded “The judge found there was no duress. In my view, the facts fall far short of supporting this submission of the appellants . . . it must fail as a ground of appeal.”

[79] The “facts” in *Burns*, that is the undercover techniques, were not qualitatively different from those used in this case. If anything, they were objectively more coercive than those used in this case. The same is true in *Roberts*.

[80] The only clear distinction between this case and *Burns* is the age of the target. Here the accused was 16 to 17 at the relevant time. The fugitive Burns was 19.

[81] To accept the submission of defence counsel that age is a critical

¹³⁶ *Ibid.* at paras. 32-37.

distinction would be to promulgate a judge made rule that the type of undercover operation mounted in this case and many others is constitutionally impermissible where the target is a young person.

[82] The trial judge in *Burns* found that the undercover officers' "conduct viewed objectively would not ... shock the sensibilities of an informed community considering the brutality of the crime then under investigation and would not bring the administration of justice into disrepute." The Court of Appeal agreed. I am unable to conclude that the age difference between O.N.E. and that of *Burns* transforms this case into one which would shock the sensibilities of the community.

[83] Defence counsel also relied on the fact the police knew the accused in this case was a "street kid" with a "horrendous" background of parental neglect and abuse.

[84] It does not follow that the community would be shocked by the police embarking on this undercover operation without evaluating in advance the likelihood the target might respond to undercover techniques by giving a false confession. Reliability of the fruits of these undercover operations is a matter for determination at a trial in light of all the circumstances.

[85] The undercover operation in this case is indistinguishable on any principled basis from that used in many other cases. I therefore find that the argument it amounted to an abuse of process violating s. 7 of the *Charter* fails.¹³⁷

Clearly the abuse of process argument failed utterly in this case. However, the judgment does raise some issues.

Firstly, although the voir dire judge denies any legal relevance to O.N.E.'s under-18 status, that view is definitely too simplistic. There is no doubt that Canadian statutes and common law envisage a different procedure and a different application of the criminal law for accused persons under 18 years of age. This indisputable fact undermines the trial judge's statement that there is no principled basis for distinguishing the case of O.N.E. from those involving adult targets. After all, what more principled basis could there be than the fact that the different treatment of youths by our criminal

¹³⁷ *Ibid.* at paras. 75 to 85.

law is established by Parliament and has indeed been in effect since 1908 with the passage of the *Juvenile Delinquents Act*?¹³⁸

Secondly, it is also an indisputable fact that, although it has recently been linked with or subsumed by section 7 of the *Charter*, the doctrine of abuse of process is, in a practical sense, entirely a common-law doctrine. In determining the existence or absence of abuse of process Canadian judges refer only to stare decisis in their decisions. They do not refer to the *Criminal Code* or any other statutory authority. This fact serves to weaken any apparent motivation underlying the trial judge's stated reluctance at paragraph 81 to "promulgate a judge made rule that the type of undercover operation mounted in this case and many others is constitutionally impermissible where the target is a young person." After all, we know the judge is entitled to evaluate community shock, and we also know that Canadian law clearly mandates that youths should be treated differently in criminal cases.

Another highly significant factor is the fact that *O.N.E.* is a case of first instance, i.e. this is the very first case in which a Mr. Big sting was used upon a youth as defined by the then operant but now repealed *Young Offenders Act*,¹³⁹ or the present *Youth Criminal Justice Act*.¹⁴⁰ This being the case, it seems somewhat miserly for a judge to decline to give any reasons for refusing to treat a young person differently than an adult offender in determining the existence of an abuse of process. This is especially the case when one considers how mentally and emotionally manipulative the sting is, and juxtaposes that problematic state of affairs with the fact that the *Young Offenders Act*

¹³⁸ R.S.C. 1970, c. J-3.

¹³⁹ R.S.C. 1985, c Y-1.

¹⁴⁰ S.C. 2002, c. 1.

specifically recognized that the mentality of young people in relation to crime is fundamentally different than the mentality of an adult. Also, what if the target had been only twelve and thirteen or thirteen and fourteen years old at the time of the sting? Would that make any difference in determining whether the sting would be a dirty trick or shock the conscience of the community? If so, why should the trial judge draw a line at *O.N.E.*'s age of sixteen and seventeen years? Where should the line be drawn if not where it was drawn by Parliament: on an accused's eighteenth birthday?

Of course, to give the Crown argument its due, it must be acknowledged that rules of evidence should in almost all cases apply equally to parties regardless of age. However, it is still maintained that it is significantly short sighted for a voir dire judge to refuse to take into account a target's status as a youth in determining whether there has been an abuse of process.

As a final note, it bears mentioning that, contrary to what is stated in the judgment, the violent scenario was not used in *Burns and Rafay*, although it was used in *Roberts*. Much more could be said about the very unique and interesting case of *R. v. O.N.E.*, which, as far as one can tell, is not only the only first time Mr. Big was used on a child, it is also the only Mr. Big case which resulted in a verdict of not guilty being returned by a jury.

The violent scenario is probably the most contentious tactic used by the police in the Mr. Big sting. Even so, its use has never been ruled to be an abuse of process. However, it does bear mentioning that it has received some *obiter* criticisms from the bench for its extreme nature. Allbright J. in *Hathway*, opined as follows about the violent scenario used in that case:

As this scenario was audio recorded, the best evidence is the recording itself as it displays the roles of all the participants and their demeanor. At no time during this scenario is any violence purportedly directed towards Mr. Hathway nor are any threats. His submissions relating to this scenario are to the end that the use of a firearm is inappropriate and extreme, and as his counsel has very ably argued, this scenario, if understood by the community at large, would be found to be shocking. I have carefully considered this scenario, albeit at this stage in isolation, and have concluded that while it is extreme and I too have concerns about the manner in which the firearm was used, particularly pointing it at two individuals, I am unable to say the community would find this scenario shocking. It has been utilized on other occasions and has not been found to be so deviant or violent that its use would offend the community to the level required for the demonstration of an abuse of process. Such does not end the potential impact, however, of this scenario as the applicant rightly contends that the entire operation must be examined, and this, of course, is a significant portion of that undercover operation.¹⁴¹

In an earlier case, *R. v. Smith*¹⁴² Stewart J. remarked upon the “obvious stupidity” and “pervading unseemliness” of having the target assist in a violent scenario by applying force to an undercover officer in a staged execution termed “the boyfriend hit scenario”.¹⁴³

In Canadian law, the violent scenario never shocks the conscience, and its use to impress, intimidate or instill fear in the target is never deemed a dirty trick. More could be said about violent/execution scenarios and about threats and intimidation in general in Mr. Big stings being abuses of process. That said, in the interest of brevity we now turn to another contentious issue in the abuse of process cases: the use of alcohol during the sting.

To those possessing even a passing familiarity with the criminal justice system, the ever-present and profound influence of alcohol on criminality in general is

¹⁴¹ *Hathway*, *supra* note 9, at para. 164.

¹⁴² (January 15, 2003), Vancouver CC011596 (B.C.S.C.) [*Smith*].

¹⁴³ *Ibid.* at para. 13.

undeniable. Many, if not the majority of crimes that are examined before the courts, end up being found to be fuelled by alcohol. Mr. Big stings often employ alcohol in the playing out of their scenarios. Many Mr. Big targets have no particular problem with drugs and alcohol. However, a large minority of the targets do have significant drug and alcohol addiction problems. Not surprisingly, these are the targets who usually also have a criminal record. Possibly the most compelling case with regard to alcohol is that of *R. v. Cretney*.¹⁴⁴ Cretney was suspected of having murdered Moffat. As usual, there was insufficient evidence linking him to the crime and a Mr. Big operation was planned:

[6] Cst. Rolfe and Cst. Neale travelled to Prince George and reviewed the available file material before preparing an operational plan for the undercover operation. As a result of their review of available file material the R.C.M.P. were aware that the accused and Moffat had met while both were resident in a detox facility, that the accused had a problem with alcohol abuse, and that alcohol had been a factor in a somewhat stormy common-law relationship between the accused and Anna Smeds.

[7] The operational plan eventually put into effect contemplated an operation lasting 112 days and provided for in its budget a \$1,500 allowance for liquor.¹⁴⁵

Clearly, the police were aware that Cretney had an alcohol addiction problem. It is equally clear that, with fifteen hundred dollars to spend (in 1997 dollars!), the undercover operators were prepared to uncork as many bottles as it took to make sure the operation was a success.

The court summarized the police view as follows:

[13] From the outset alcohol was a significant part of this operation. The police officers in their evidence described it as a "prop" which served a number of purposes but was mainly intended to create a natural atmosphere in which the

¹⁴⁴ [1999] B.C.J. No. 2875 (B.C.S.C.) [*Cretney*].

¹⁴⁵ *Ibid.* at paras. 6 to 7.

undercover operator could pursue the development of a relationship which could lead to admissions which would assist the investigation.

[14] The officers denied that there was any intention to use the accused's alcohol "problem" and exploit it to assist their investigation.

[15] Alcohol was made available in hotel rooms and vehicles, in part to create the impression that these were criminals not police officers. Cpl. Clark testified that the purpose was to add realism to their contacts and to convince the accused that if he was prepared to drink and drive he was obviously not a police officer. It is obvious from some of the taped conversation that this desired affect was achieved in this case. It is equally obvious that achieving a comfort level between the undercover operator and the target is a basic part of safeguarding the operator.¹⁴⁶

The court summarized Cretney's view as follows:

[16] The accused submits that in this case the R.C.M.P. utilized alcohol as an investigative aid and, in doing so, they failed to act in accordance with basic principles of decency and fair play. He submits that condonation of the conduct of police officers in this case could bring the administration of justice into disrepute.

[17] The accused goes on to submit that the R.C.M.P. knew that alcohol played a major role in his life and that from some of the conversations with him, that he was struggling to deal with that problem, yet they persisted in providing him with alcohol and making it available to him. The provision of alcohol to an alcoholic by an agent of the state pretending to be his friend, in the hope that he will confide in him, he submits, offends every notion of fair play and decency.¹⁴⁷

The court's conclusion as to whether police conduct had offended principles of fair play and decency is set out in these terms:

[28] In my respectful view, the accused has wholly failed in the circumstances of this case to establish conduct on the part of the undercover officers that offends the relevant principles. I am satisfied on the evidence, and find that the use of alcohol in this investigation was nothing more than a prop which provided a part of the "entry point" for Cpl. Clark and a significant measure of protection for the

¹⁴⁶ *Ibid.* at paras. 13 to 15.

¹⁴⁷ *Ibid.* at paras. 16 to 17.

officer by building his cover and credibility.

[29] It is neither logical nor required in law that police officers investigating serious offences such as murder seek to convert their targets from their normal activities to afternoon tea and contract bridge parties. Indeed, what will normally be required if undercover operations are to enjoy some opportunity for success is for the officer to seek to participate in the normal activities of the target. What the officers did in this case is precisely that, in my view they did nothing more than set a stage on which they sought to act out their play in as real and believable a manner as they were able to do. The provision of alcohol and their discussions concerning it amount to nothing more than the providing of opportunities to an accused who willingly took them.

[30] If there is a line to be crossed which could result in exclusion based on the arguments advanced in this case it was not crossed in the present circumstances. The accused's application to exclude under s. 7 and 24 of the **Charter** fails.¹⁴⁸

It is submitted that the Trial Judge's conclusions in *Cretney* are somewhat short on reasoning. As is sometimes the case in abuse of process decisions, a decidedly whimsical recourse to metaphor is employed, i.e. undercover operators cannot be expected to divert targets from their normal activities to "afternoon tea and contract bridge". Of course all we know of Cretney's "normal activities" in this case is that he had resided in a detox centre in an attempt to overcome what must have been a serious alcohol addiction and that he had relationship problems because of his drinking.

The trial judge does not recognize alcohol, even fifteen hundred dollars worth of alcohol, as an investigative aid. He only characterizes it as a "prop", used for "setting a stage" and as an "entry point" for the officers to execute their investigation. Of course what alcohol is, in addition to all that Parrett J. has defined it as, is a powerful drug that retards brain function, lowers inhibitions, and is well-known to cause people under its influence to do and say things which they would not do or say if they were sober.

¹⁴⁸ *Ibid.* at paras. 28 to 30.

The classic definition of abuse of process includes the concrete example of injecting a diabetic with sodium pentothal under the pretense that it is insulin in order to get a suspect to make an incriminating statement. Of course alcohol addiction cannot be equated with diabetes and alcohol cannot be equated with sodium pentothal. However, it is contended that the dismissal of alcohol as a “prop” used to set a stage may be disingenuous with regard to Mr. Cretney’s situation. Alcohol is a drug that profoundly affects behaviour. Somebody who goes into “detox” for alcoholism can be presumed to have experience with behavioural change as a result of alcohol abuse. One might wish to know more about the extent to which alcohol was used in this case and why its use did not “cross the line”. Of course, as in many cases, the relative dearth of facts in this six-and-a-half-page-long judgment make that determination impossible. How much did Cretney drink and was he drunk when he made incriminating statements? We do not know.

*R. v. Hathway*¹⁴⁹ has a more in-depth discussion of alcoholism. Either the defence in this case made a more nuanced and comprehensive argument on the subject or the Trial Judge decided to address it more fully in his reasons, or both. At paragraph 41 of the judgment, the Trial Judge notes that “in the early stages [of the sting], Mr. Hathway advised Constable Chubbs [the primary undercover operator] that he was a recovering alcoholic”.¹⁵⁰ Hathway argued that it was an abuse of process for the undercover team to have used alcohol in the sting as they did. At paragraph 130, the Trial Judge summarized Hathway’s position as follows in relation to alcohol:

¹⁴⁹ *Hathway*, *supra* note 9.

¹⁵⁰ *Ibid.* at para. 41.

The applicant, prior to encountering the undercover operative, had gained control of his alcohol consumption; however, after becoming involved with the operative, he was provided with alcohol and the means to obtain alcohol on a continual basis, adding to the psychological dependence of the applicant on the undercover operatives and becoming more susceptible to their influence. This conduct of providing alcohol to an individual known to be a recovering alcoholic amounted, in and of itself, to an abuse of process. Consumption of alcohol, particularly the “fireball”, occurred routinely and was part of virtually every scenario.

On February 27, 2004, the applicant was tasked with driving a vehicle from the coast to Kelowna, and the undercover operative knew or ought to have known that he would consume alcohol. On that occasion, the applicant rear-ended a truck operated by another individual and caused damage in excess of \$5,000 to both vehicles.

It is the position of the applicant that the undercover operatives either knew (and perhaps facilitated) or at least were wilfully blind to the consumption of alcohol while operating motor vehicles and thus ultimately allowed him to commit what would be a *Criminal Code of Canada* offence on February 27, 2004.

.....

The undercover operative failed to enforce the provincial statutes of British Columbia when Mr. Hathway consumed alcohol in a motor vehicle.¹⁵¹

The primary undercover operator, Chubbs, denied knowingly allowing Hathway to operate a motor vehicle while impaired.¹⁵²

In his analysis, Allbright J. gives the following analysis of the role of alcohol in the sting:

[165] The constant theme throughout the undercover operation was the consumption of alcohol by Mr. Hathway. His ability to purchase this alcohol was either funded by the undercover operation or provided directly to him in social settings or in lounge settings. Mr. Hathway has testified that he was managing his alcohol issue well at the time of becoming involved in the operation and contends that it was highly inappropriate for the undercover operatives to use alcohol as a repeated tool in the investigation. There are few judicial pronouncements on the propriety of an undercover operation using alcohol, and those limited comments

¹⁵¹ *Ibid.* at para. 130.

¹⁵² *Ibid.* at para. 131.

do not suggest that such a use amounts to an abuse of process. Here the applicant contends, however, that these pronouncements deal with the effect of giving alcohol to a “currently and practising” alcoholic rather than using them, in this instance, where the individual in question has been making significant attempts to either control or abstain from the use of alcohol. In considering the total picture and the impact of alcohol, I am led to the conclusion that Mr. Hathway had a choice whether he would or would not consume alcohol, and that he exercised the choice to do so. During his testimony, he demonstrated a mature and articulate understanding of the issue of personal choice in the use of alcohol, and the evidence on the scenarios is to the effect that alcohol was consumed by choice. As other courts have commented upon, the criminal organization might well be expected to reflect alcohol consumption in its members and simply to the extent alcohol was utilized could not be said to be a point of vulnerability to the operation. That would, however, not be the case were undercover operatives aware of the fact that the target individual was consuming alcohol to such an extent that that individual’s mental faculties were influenced in a way that would be considered unfair or unscrupulous. In considering the role that alcohol played in the videotaped meeting with “the Big Boss”, it is not at all apparent that there was an abuse of alcohol as a prop either by its simple usage or its overconsumption. Were there evidence before the Court that Mr. Hathway was a reluctant participant in the consumption of alcohol and that it was only after a period of persistent pressure that he conceded to the use of alcohol, the complexion of the role of alcohol might be viewed differently. However, as I have indicated, I am not persuaded that the use of alcohol in the various scenarios was excessive or such as to amount, in and of itself, to an abuse of process.

[166] The applicant also contends that undercover officers were aware of his overconsumption of alcohol and allowed him nonetheless to participate in activities such as driving a vehicle when he clearly ought not to have been doing so. In considering this aspect, I accept the evidence which has been provided to me to the effect that access to alcohol provided to Mr. Hathway was in limited quantities and that he was not placed in a position of driving a vehicle when undercover officers knew that he ought not to be. Again, as an example, it was Mr. Hathway who chose to consume alcohol on the drive from Vancouver to Kelowna, leading to the automobile accident.¹⁵³

Allbright J.’s reasoning here is more fully fleshed out than in other Mr. Big cases in which alcohol played a major factor. Clearly he found on the facts before him that the use of alcohol did not amount to an abuse of process in Hathway’s case, but he did make what seems a reasonable observation that a persistent pressure to use alcohol placed on an

¹⁵³ *Ibid.* at paras. 165 to 166.

abstaining alcoholic could cause alcohol's role to be viewed differently in one of these stings.

Of course one of the most significant factors in Allbright J.'s finding may well be the fact that there was very little alcohol consumed at the time of the confession itself. This may not have been the case in a British Columbia judgment, *R. v. Raza*.¹⁵⁴ The facts surrounding alcohol consumption in *Raza* are far from exhaustively detailed in this judgment, but from what is available it seems to have been the case that the target Oliveira was brought to a Radisson hotel room in order for him to have an interview with the crime boss. Defence counsel argued that "Mr. Oliveira was encouraged to drink excessive quantities by the undercover operators. Investigators were unable to account for the amount consumed, as they usually do."¹⁵⁵ This apparently had something to do with a delay in recording equipment installation:

The Crown acknowledges that more alcohol was consumed than was desirable before the Radisson scenario involving Mr. Oliveira. The Crown argues, however, that the evidence does not support a finding of intoxication. Further, more alcohol was consumed than otherwise would have been the case because of the necessity of awaiting the installation of listening devices in the Radisson Hotel.¹⁵⁶

The above quotes do not really help in determining the level of intoxication of Oliveira, however it does seem that the question of whether or not Oliveira had attained a level of what might be called 'actual drunkenness' was in issue in this case. In any event, the statements made by Oliveira were ruled admissible. At paragraph 80, the Trial Judge, Josephson J., cited a previous judgment of the British Columbia Supreme Court:

¹⁵⁴ *Raza*, *supra* note 40.

¹⁵⁵ *Ibid.* at para. 64.

¹⁵⁶ *Ibid.* at para. 68.

[I]n *R. v. Peterffy*, [unreported] April 1, 1998, Courtenay Registry (B.C.S.C.), Callaghan J. dealt with the issue of intoxication by an accused making an inculpatory statement during a "scenario". At p. 4 he stated:

I do not find on the evidence that the accused was intoxicated, but even if he was, his intoxication would not affect the admissibility of these statements. Truthfulness, discrepancies, or exaggeration in the admissions of the accused go to the undercover officers caused by the imbibing of alcohol go to weight rather than to admissibility, and accordingly are matters properly left for the jury to weigh and consider.¹⁵⁷

The use of alcohol was ruled not to be capable of shocking the community. In his conclusion at paragraphs 87 and 88, Josephson J. stated:

With respect to the impact of alcohol consumption before and during inculpatory statements on the reliability of those statements, the jury is capable of understanding (i) the role played by the undercover operators in encouraging and permitting the consumption of alcohol by the accused; (ii) the failure of police to keep an account of the liquor consumed during the "Skyline" and "Radisson" scenarios; (iii) the assessment of opinion evidence of the undercover operators regarding the degree of sobriety of the accused persons; and (iv) the assessment of inferences to be drawn regarding sobriety from the conversations that took place.

The proposed evidence is sufficiently reliable to be admitted. It's [sic] probative value exceeds its prejudicial effect. The evidence was not gathered in "an abusive fashion", nor would its admission as evidence constitute an abuse of process or render the trial unfair. In the circumstances, informed members of the community would not be shocked by the conduct of police in the investigation of this alleged crime.¹⁵⁸

Clearly the use of alcohol in Mr. Big stings in Canada will not be found to be a dirty trick capable of shocking the conscience of the community. In the interest of brevity, no more cases will be cited, however, as a closing observation one wonders how much worse things might have to get before a judge could be convinced that giving an

¹⁵⁷ *Ibid.* at para. 80.

¹⁵⁸ *Ibid.* at paras. 87 to 88.

alcoholic alcohol in a Mr. Big sting is a bad idea, if not actually an abuse of process. Hathway, for example, was definitely driving a car because he was told to do so by Chubbs the primary undercover operator. Hathway claimed Chubbs knew or ought to have known he was impaired. Chubbs denied this. Hathway got into an accident. Nobody was hurt, but if somebody had been injured or killed as a result of Hathway's drunk driving, one wonders what effect this might have had on the conscience of the community and the conduct of future Mr. Big stings.¹⁵⁹

A final and doubly unique case to be discussed in the abuse of process section of this thesis is that of *R. v. Proulx*.¹⁶⁰ *Proulx* is highly significant to a study of Mr. Big because it is the only Canadian case to consider in any detail the law of the United Kingdom as it pertains, or might pertain, to these types of undercover operations. In fact the sting was conducted entirely within the United Kingdom, by Canadian police officers, but under the strict supervision of British law enforcement.

As far as abuse of process is concerned,¹⁶¹ *Proulx* is unique in that undercover operators in this case worked towards breaking up a relationship in order to get the confession they were looking for:

[12] A feature of this operation resulted from the fact that Proulx was engaged to a young British woman and was living in her family's home. He disclosed to W. that he felt trapped by that relationship, was unhappy in it, but could not

¹⁵⁹ Another case in which alcohol played a very large role is *Griffin*, *supra* note 10. The target was described as a heavy drinker, capable of consuming over twenty ounces of vodka at a sitting with the undercover operators. That said, drunkenness was not ruled to be a significant factor in that case.

¹⁶⁰ 2005 BCSC 184, 29 C.R. (6th) 186 [*Proulx*].

¹⁶¹ *R. v. Proulx* is one of those Mr. Big judgments in which the words "abuse of process" do not appear, and from which it cannot be determined if abuse of process was actually pleaded. However, abuse of process language is used and shocking the community is clearly the issue.

extricate himself because he had little money and nowhere to go.

[13] W. and the other undercover officers were of the view that the control Proulx's fiancé had over him was interfering with their operation. They decided to work on breaking up that relationship, or at least distancing Proulx from his fiancé. They brought in a second British policewoman undercover who acted as if she might be interested in Proulx.

[14] W. acted in such a manner as to demonstrate that he did not let his woman push him around and neither should Proulx. He held out the prospect of financial gain and a good life for Proulx if he became part of their organization. W. made it clear to Proulx that if Proulx were to join them he would be checked out by a person superior to W. in the organization, a man called "Mack" who resided in Canada.

[15] The undercover officers were good actors. Proulx fell for the story.¹⁶²

This tactic was apparently objected to by the defence, but the trial judge, Williamson J., disagreed:

[44] The suggestion that somehow it was unacceptable for the undercover officers to interfere not only with the actions of Proulx, but of his then girlfriend by deliberately manipulating things so that he would leave her, thus enabling them to have more access to him, falls when one notes that it was Proulx himself who volunteered that he was unhappy in the relationship and wished to get out of it, but could not for what appeared to be principally economic reasons.¹⁶³

This would seem to be the only case in Canadian Mr. Big jurisprudence where such a tactic was employed and as such it cannot be subject to criticism on the grounds of stare decisis.

That said, the tactic does not seem entirely tenable from a logical or ethical perspective. Spousal relationships, as well as the relationships between sweethearts or lovers, are certainly well known for, arguably defined by, the fact that they are difficult to

¹⁶² *Ibid.* at paras. 12 to 15.

¹⁶³ *Ibid.* at para. 44.

maintain and prone to instability. Probably nobody would argue against the proposition that many, if not most, of the participants in a long-term relationship at one time or another feel dissatisfied and consider leaving the partnership. It is a fairly universal and common experience. This being the case, it seems somewhat harsh for a judge to opine that a Mr. Big target's expression of dissatisfaction with his partner triggers a right on the part of the police to try and break up his relationship in order to achieve their goal of gathering evidence. This is more a Soviet-style State Security trick than a Canadian undercover police tactic.

In any event, Williamson J. ruled that the tactic was not shocking:

[52] I am satisfied, as was Mr. Justice Hall in the *Roberts* case cited above, that a reasonable, dispassionate person in this country, aware of the circumstances surrounding this case, would not consider the activities of the undercover police officers shocking. What happened here is hardly so grossly unfair as to repudiate the values underlying our trial system. I conclude the statement is admissible.¹⁶⁴

As previously stated, *Proulx* is a case of first instance with regard to what we might term “the break-up scenario”. This being the case one can now only conclude that it is permissible for undercover police to attempt to break up relationships between targets and their partners, spouses, boyfriends or girlfriends; provided the target expresses dissatisfaction about his relationship.

In conclusion, the abuse of process argument has never been successful in Canadian courts when put forward by the defence in Mr. Big cases. Obviously, it is contended in this thesis that judgments in relation to this doctrine have sometimes been wrongly decided or simply not thought through all the way to their logical conclusions. It

¹⁶⁴ *Ibid.* at para. 52.

is submitted that probably the biggest single legal error made is judicial over-reliance on the Supreme Court of Canada's one-paragraph decision in *R. v. McIntyre*¹⁶⁵ as firm authority for concluding that Mr. Big sting evidence does not shock the community. There is simply not enough information available from the law reports to determine whether this New Brunswick case is a Mr. Big case or not. It likely would not be, since the sting occurred in 1990, roughly five or six years before the classic Mr. Big stings began to be implemented in British Columbia. That said, it would probably be necessary to review the transcripts and the court file to make an accurate determination.

Although they have failed, abuse of process arguments are likely to continue to be made in Mr. Big cases. This is so because, unlike the common law involuntariness argument, which is universally held to be absolutely foreclosed because of the lack of a person in authority, the abuse of process argument has been ruled to be capable of succeeding under the right circumstances. Rosenberg J.A., for example, for a unanimous Ontario Court of Appeal, stated that "I should not be taken as holding that the manner in which the Mr. Big strategy is executed could never shock the conscience of the community and lead to exclusion on common law grounds".¹⁶⁶ The British Columbia Court of Appeal has recently cited this statement with approval.¹⁶⁷ Of course there is also the fact that The Supreme Court of Canada in *Grandinetti*, which was definitely was a Mr. Big case, ruled unequivocally and specifically that abuse of process can act as a filter in such cases. So targets and defence counsel can at least be thankful for small mercies.

¹⁶⁵ *Mcintye (S.C.C.)*, *supra* note 103.

¹⁶⁶ *R. v. Osmar (C.A.)*, *supra* note 8 at para. 48.

¹⁶⁷ *R. v. Bonisteel*, *supra* note 33 at para. 93.

CHAPTER FIVE – EXPERT EVIDENCE

In some respects, expert evidence may be the area of criminal evidence least susceptible to overlap with other areas of evidence in the Mr. Big context. It appears to have little to do with the *Charter*, with common-law voluntariness or with abuse of process. On the other hand, one should not lose sight of the fact that social science research was cited extensively by the Supreme Court of Canada in their ruling on voluntariness in *R. v. Oickle*.¹⁶⁸ Furthermore, expert evidence has also been ruled admissible in some cases, at the instance of the defence, and even in one of the rare cases resulting in an acquittal.

Of course the major difference in an examination of this area of the law of evidence is that while in all of the other areas defence counsel is arguing against admission of evidence and crown counsel is arguing for inclusion, in the case of expert evidence it is the defence who is arguing for admission while the crown is opposed. An examination of the cases shows that the defence is almost as unsuccessful in its endeavours to call expert witnesses to the stand as it is in its efforts to have confessions excluded. That said, as mentioned above, there is definitely some degree of success in this area. Nevertheless, as a general rule defence counsel do not attempt to lead expert evidence in Mr. Big cases. The reasons underlying the relative lack of attempts to do so are open to speculation. It may be that, given the impecunious state of most targets, there are concerns about expense involved in the decision not to call or try to call an expert witness.

¹⁶⁸ *Oickle*, *supra* note 57.

The leading case on the admissibility of expert evidence in Canada is *R. v. Mohan*.¹⁶⁹ Sopinka J. states the law of admissibility of expert evidence briefly at page 20:

Admission of expert evidence depends on the application of the following criteria:

- (a) relevance;
- (b) necessity in assisting the trier of fact;
- (c) the absence of any exclusionary rule;
- (d) a properly qualified expert.¹⁷⁰

Although all four of these factors are required to be met by the party attempting to introduce expert opinion evidence, in reality the first two factors, relevance and necessity, are the only contentious ones in the Mr. Big cases.

Sopinka J., who delivered the judgment of the Court in *Mohan*, defines these two concepts relatively succinctly at pages 20 to 25 of that judgment. Relevance is defined by Sopinka J. as generally consisting of a cost benefit analysis: is the cost of admitting the evidence more than it is worth to the administration of justice? Furthermore, he defines relevance in the context of expert evidence as being something more than simple logical relevance; rather it is legal relevance that is most important to determine. The questions that the trier of law needs to ask him or herself is whether or not the expert evidence has the potential to confuse or mislead the trier of fact, or take up too much time, or be given too much weight out of deference. In short, will it distort the fact-finding process, i.e. cost more than it is worth?¹⁷¹

¹⁶⁹ *Mohan*, *supra* note 63.

¹⁷⁰ *Ibid.* at page 20.

¹⁷¹ *Ibid.* at pages 20-22.

Necessity, as Sopinka J. defines it, is the determination of whether or not the expert opinion evidence proffered is truly necessary in order for the trier of fact to reach the proper conclusion in the case. The trier of law must determine whether the subject matter of the expert opinion evidence is of such a complex or arcane or specialized nature that the trier of fact requires help in order to understand it and understand it correctly. It appears as though this determination ought to be made on a balance of probabilities, as Sopinka J. cites earlier authority in stating that the evidence should be admitted only if its lack would cause ordinary people to be “*unlikely* to form a correct judgment”.¹⁷² In essence the trial judge as trier of law here engages in a limited pre-determination of the weight of the evidence before deciding whether it should be placed before the jury or him or herself as evidence for consideration.

As was the case with regard to abuse of process in Mr. Big cases, the leading judgment in this area is arguably the Ontario Court of Appeal’s decision in *R. v. Osmar*.¹⁷³ The Court Of Appeal summarized the trial judge’s ruling on the issue of expert evidence as follows:

[20] Dr. Richard Ofshe is a social psychologist and a leading expert on the phenomenon of false confessions. His work was referred to by the Supreme Court of Canada in *R. v. Oickle* 2000 SCC 38, 147 C.C.C. (3d) 321. The defence sought to call Dr. Ofshe to testify about the reasons that suspects falsely confess and the proper method of evaluating the reliability of a confession. On a *voir dire*, Dr. Ofshe explained that, where the reasons not to confess are sufficiently reduced by making the suspect believe that resistance is hopeless and that some advantage may come from confession, both the likelihood of confession and the risk of false confession will rise. It may eventually become attractive to a suspect to admit a crime. Dr. Ofshe had not studied the Mr. Big strategy but believed that his analysis of statements to known persons in authority could be adapted to the Mr. Big method. He testified that the inducements held out to the

¹⁷² *Ibid.* at page 23, emphasis added.

¹⁷³ *Osmar (C.A.)*, *supra* note 8.

appellant were similar to the inducements held out in normal police interrogations.

[21] Dr. Ofshe also pointed out that, while the phenomenon of false confessions is very well known to social psychologists, most people presume that innocent people will not confess falsely. Finally, he testified that the way to evaluate the reliability of the confession is to compare the details in the confession with the facts of the murder not given to the suspect by the police. He also testified about the danger of contamination in this case, that is, the risk that details of the killings as conveyed to the undercover police officers by the appellant came from the investigating officers who had earlier interrogated him.

[22] The trial judge held that Dr. Ofshe's evidence was not admissible as it did not meet the test for admission of expert evidence. The trial judge held that evidence was neither relevant nor necessary. I will expand on Dr. Ofshe's evidence when I deal with the ground of appeal relating to the exclusion of his evidence.¹⁷⁴

Although this is merely a brief précis of the situation in a particular case, the Ontario Court of Appeal in this passage touches on three major points besides necessity and relevance in relation to expert evidence. Firstly, they refer to what might be termed the 'upside versus downside' dynamic evident in most Mr. Big cases. Secondly, the existence of a bias or presumption among laypersons that innocent people will not falsely confess is posited. Thirdly, the court acknowledges the reliance upon social science evidence by the Supreme Court of Canada in *R. v. Oickle*, and particularly upon Dr. Ofshe's own work.

Although not entirely unsympathetic, as we shall see, the Ontario Court of Appeal ultimately upheld the trial judge's decision to exclude Dr. Ofshe as a witness. Rosenberg J.A. describes Dr. Ofshe as a social psychologist who has engaged in years of study of police interrogation methods. He further notes Dr. Ofshe's familiarity with the court system as an expert witness and the fact that he has authored many works in the area of

¹⁷⁴ *Ibid.* at paras. 20-22.

false confessions. He also notes that Dr. Ofshe has done no study of the Mr. Big sting specifically.¹⁷⁵

Rosenberg J.A. also noted that Dr. Ofshe proposed to testify on three separate but related topics. Firstly, he proposed to testify as to the existence of the belief among laypeople that an innocent person would not falsely confess to a crime he had not committed. Secondly, he proposed to testify as to what might motivate a person, guilty or innocent, to confess having committed a crime to a person in authority. The third topic on which Dr. Ofshe would testify was how to evaluate whether or not a confession was false.¹⁷⁶ The Ontario Court of Appeal continued:

[57] As to the first theme, unfortunately Dr. Ofshe did not provide any information as to why lay people, such as jurors, have difficulty believing that an innocent person would confess to a crime they did not commit. I note, however, that the Supreme Court recognized this phenomenon in *Oickle* at para. 34:

In this context, it may seem counterintuitive that people would confess to a crime that they did not commit. And indeed, research with mock juries indicates that people find it difficult to believe that someone would confess falsely.

[58] Since Dr. Ofshe did not provide any information as to why people have difficulty believing innocent people will falsely confess, it is unclear whether the information he could provide on that issue, gained from examining confessions to people known to be persons in authority, would be of any value in the different context of a confession to an undercover officer. I will return to this issue when I consider the admissibility of the evidence.

[59] As to the second theme, Dr. Ofshe spoke at length about how police interrogators persuade suspects to confess. Again his work in this area relates to interrogations by people the suspect knows to be police officers. He focused in particular on the use of motivators. Low-end motivators, such as suggesting to suspects that they do the right thing, are unlikely to make an innocent person of normal mental make-up confess. Rather, it is only powerful motivators involving psychological coercion that are likely to lead to a false confession. He explained that police interrogators will describe the justice system to the suspect in such a

¹⁷⁵ *Ibid.* at para. 55.

¹⁷⁶ *Ibid.* at para. 56.

way that even an innocent person may be persuaded that it makes sense to confess to minimize punishment. This can be enough to overcome innocent persons' obvious reluctance to admit to a crime and place themselves in jeopardy from the formal justice system. One way this strategy works is by setting up alternatives. The suspects are told that if they continue to deny their involvement they will be charged (in the United States) with capital murder and executed, but if they agree to what the interrogator thinks happened, for example a killing in self-defence, then the punishment will be less.

[60] Dr. Ofshe testified that in an undercover operation like the Mr. Big strategy the possibility of being punished for confessing falls to zero since the suspect perceives the situation as one in which the state is not involved. As he said: "The significant question would be what's the motivator that is being offered to elicit the compliance. If the motivator is strong, if there is a powerful inducement, then depending on the power of that inducement, the risk of possibly eliciting a false confession goes up." He considered the Mr. Big strategy to be a potentially dangerous one because there is no downside to making the claim of involvement in criminality.

[61] Finally, Dr. Ofshe testified that the way to test whether a confession is true or false is to compare the information provided by the suspect with the known facts. If the confession demonstrates actual knowledge of the crime that can be confirmed and is known only to the police and the actual perpetrator, it is likely to be true. Thus, "errors" by the suspect in describing the crime are significant. He also testified that contamination is a very serious problem in interrogation. Contamination occurs because the suspect has acquired information about the crime from other sources, including the police interrogators. As he said, "If you can't eliminate contamination, you cannot know that if someone gets a fact right, and that's an objectively knowable fact, you cannot know that they acquired that [fact] because they were present. It's always possible they acquired it because they were told about it." He described this part of his evidence as "very straight forward, it's the basic principle of all investigation, looking for evidence that supports the existence of a fact".

[62] In cross-examination, Dr. Ofshe provided a helpful summary of the assistance he could give to the jury. He said that because the phenomenon of false confession is badly understood he could put the jurors "in a better to position to make their own judgment about how to evaluate the interrogation and also by focusing on the product of the interrogation, the confession itself". His role was "to try to dispel certain myths that are widely held, and also to make clear a simple analytic structure for understanding this particular interrogation strategy".¹⁷⁷

Having given the above assessment of Dr. Ofshe's evidence, the Ontario Court of

¹⁷⁷ *Ibid.* at paras. 57 to 62.

Appeal then went on to summarize the Trial Judge's ruling on admissibility; specifically, the Trial Judge had ruled that the expert evidence did not meet the *Mohan* criteria for relevancy or necessity. The Trial Judge also ruled that the proposed evidence was subject to more than usual scrutiny as it was novel in nature, being an attempt to apply psychological phenomena observable in traditional police interrogations to the type of questioning that occurs in undercover operations. The Court of Appeal pointed out the Trial Judge's finding that Doctor Ofshe's evidence went only to credibility and therefore was not legally relevant. Furthermore, they referred to the Trial Judge's finding that the practice of comparing known facts with what a target says in a confession is what any ordinary juror was expected to do anyway, and that Dr. Ofshe's opinion on that matter was therefore not legally necessary.¹⁷⁸

Rosenberg J.A.'s ruling for the unanimous Court of Appeal begins as follows:

(iii) Analysis

[66] I agree with the trial judge's conclusion that Dr. Ofshe's evidence was not admissible in the circumstances of this case. What I say here should not be taken as a finding that this kind of evidence could never be admitted in other circumstances. I also intend to limit my analysis to whether the evidence meets the necessity requirement for admission of expert evidence. I tend to agree with the appellant that the trial judge may have taken too narrow a view of the possible relevancy of the evidence by focusing solely on its value in determining the appellant's credibility. Dr. Ofshe's evidence was broader than that and went to the question of the reliability of the appellant's statements to the undercover officers in the context of the Mr. Big strategy. This would have been an issue in the case, even if the appellant did not testify.¹⁷⁹

Significantly, the Court of Appeal here notes that the expert evidence may indeed pass

¹⁷⁸ *Ibid.* at paras. 63 to 65.

¹⁷⁹ *Ibid.* at para. 66.

the test of legal relevance. That said, Rosenberg J.A.'s ruling on necessity was unfavourable towards the accused:

[67] As is well known, in *Mohan*, Sopinka J., speaking for the court, held that the admission of expert evidence depends on relevance, necessity in assisting the trier of fact, the absence of any exclusionary rule and a properly qualified expert (p. 411). He described necessity in these terms at p. 413:

What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in *R. v. Abbey*, *supra*. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. In *Kelliher v. Smith* [1931] 4 D.L.R. 102, at p. 116, [1931] S.C.R. 672 (S.C.C.), this court, quoting from *Beven on Negligence*, 4th ed. (1928), p. 141, stated that in order for expert evidence to be admissible, "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge".

[68] In my view, the three areas about which Dr. Ofshe proposed to testify did not meet this test. In particular, given the particular circumstances, his evidence was not about matters on which ordinary people are unlikely to form a correct judgment.

[69] I start with his evidence about the bias among lay people against the idea that someone who is indeed innocent might falsely confess. As I have said, unfortunately Dr. Ofshe did not explain the reason for this phenomenon. I suspect that it comes from the difficulty that lay people have in applying their own experience to the circumstances of police interrogation. While most people would understand how a person could come to admit to almost anything, true or false, under torture or physical coercion, they would find it hard to understand why someone would admit to a crime they did not commit and thus place themselves in greater legal jeopardy than they would encounter from simply tolerating the psychological coercion of interrogation. If that is the explanation, Dr. Ofshe's evidence would not be helpful to the jury since it was anchored in formal police interrogation. If there is some other explanation for this bias, it was not forthcoming from Dr. Ofshe.

[70] Similar considerations apply to Dr. Ofshe's evidence concerning the manner in which interrogations are conducted and the motivators for false confessions. I repeat a portion of Dr. Ofshe's evidence quoted above: "The significant question would be what's the motivator that is being offered to elicit the compliance. If the motivator is strong, if there is a powerful inducement, then depending on the power of that inducement, the risk of possibly eliciting a false confession goes up." In this case, the motive for a possible false confession was obvious, as was the fact that there was no downside to confessing to men the

appellant believed were criminals. There were no myths to be dispelled; Dr. Ofshe would simply be describing what was obvious from the testimony of the police officers and, indeed, from the appellant's own evidence. The jury did not require Dr. Ofshe's evidence to arrive at a correct conclusion on this issue. He did not purport to offer an opinion as to how powerful the inducement was in this case nor whether it could have led to a false confession.

[71] The final theme of Dr. Ofshe's evidence was that the way to determine whether the confession was true or false was to compare it to the known facts about the killing. He would also testify about the risk from contamination. Dr. Ofshe's evidence would have been helpful on this issue, but, as the trial judge observed, helpfulness is not enough. The entire defence was focused on this very issue. The defence theory was that the details in the confession came from the police. The defence also pointed out that some details that the killer would have known about were not contained in the confession. The jury did not need help understanding this point. As Dr. Ofshe testified, this is a straight-forward element of police investigation.

[72] Accordingly, I would not give effect to this ground of appeal.¹⁸⁰

It is submitted that the analysis undertaken in the above passages is somewhat flawed, logically and in terms of fairness, in a few areas. Firstly, it is somewhat troubling that Rosenberg J.A. invokes the law on necessity in the test for admissibility, but seems to add an extra hurdle without precisely explaining why. At paragraph 57 he expresses regret that Dr. Ofshe did not explain why innocent persons would confess to crimes they did not commit and then thereafter directly quotes Iacobucci J.'s statement in *Oickle* that mock juries have difficulty believing in the phenomenon.

The basic problem here is that Rosenberg J.A. asserts that the problem of people being unaware of the phenomenon of false confessions exists, and that our highest court explicitly recognizes it, but insists on further explanation for some undefined reason. It is respectfully submitted that although the 'why' Rosenberg J.A. is inquiring about is or

¹⁸⁰ *Ibid.* at paras. 55-72.

may be ultimately relevant, it is not in keeping with the law of evidence to insist upon the answer at the voir dire stage.

Requiring reasons as to why a phenomenon occurs could end up being unfair to the parties and, it is argued, raises the threshold for admission on the basis of legal relevance in the absence of any demonstrable need to do so. What is important is a) the existence of the phenomenon; b) how it occurs; and c) the results of the phenomenon. The “why” insisted upon opens up a never-ending avenue of inquiry.

Lest this objection be considered a flight of petulant sophistry, it is submitted that the following analogy may be apt: a trained and qualified accident re-constructionist proposed as an expert witness states during a voir dire that he has examined skid marks at an accident scene made by a particular vehicle. He states that skid marks of such an appearance made by a vehicle of that weight indicate, or are consistent with, a rate of speed of 80 kilometres per hour and a sudden slamming on the brakes. The expert has demonstrated a phenomenon, how it occurred and the results. The knowledge is outside normal laypersons’ knowledge. However, it is submitted that it would be extremely rare for a judge in Canada to go further and ask the expert in the accident case to explain why the skid mark length indicates an 80 kilometre per hour rate of speed followed by a slamming on the brakes, or to deny admissibility for want of an explanation. For example, the expert in the accident case is not required to explain the chemical composition of the rubber of the particular tires in the accident or of the asphalt. This posited situation can be compared to what is asked of Dr. Ofshe in *Osmar*. The Mr. Big social science expert can explain the phenomenon – “people confess falsely when questioned by a skilled interrogator” and “laypeople have a hard time understanding how

it happens”. He can explain how it occurs by referring to previous wrongful convictions and explaining psychological experiments like mock-jury studies. The false confessions expert can also show the court statistics on wrongful convictions as a result of false confession, i.e. the results.

It is submitted that for some reason the expert witness in this case and other Mr. Big cases is unfairly held to a higher standard of necessity. This is especially confounding when one considers the fact, previously pointed out as significant, that the existence of false confessions and their being given undue credit by juries is acknowledged by the Supreme Court of Canada. The ‘why’ line of inquiry proposed by Rosenberg J.A. initiates a technically endless, and therefore prejudicial process in what is meant to be a threshold determination of admissibility. Must the expert propound the cultural anthropological reasons behind false confessions? Must he explain neurological aspects of the brain relating to human abilities to deceive and to detect deception? One can imagine what would be the outcome if police accident reconstruction experts were required to explain gravity, Newtonian physics and fundamental laws of motion to a voir dire judge every time they just wanted to say that an accused ran a stop sign.

Of course all of this is not to say that a defence expert ought not to be subjected to a vigorous cross-examination at trial. It is at that point that deeper and more probing ‘why’ questions can be asked. But at the point of determining admissibility of expert opinion evidence it seems obtuse of the Ontario Court of Appeal to have held Osmar’s defence to such a high standard, especially in a murder trial where the consequences for misinterpretation of evidence by a jury of laymen and laywomen are so perilously high.

Also of note in the passages cited is the ruling at paragraph 66 that the voir dire judge's exclusion of Doctor Ofshe's evidence on the basis of lack of relevancy may have been incorrect and that the Court of Appeal tended to side with the target on that issue. Equally interesting from that same paragraph is the ruling that it was definitely incorrect for the voir dire judge to rule that Doctor Ofshe was attempting to provide evidence only regarding credibility of the target, and that he¹⁸¹ was in fact attempting to provide evidence on the larger issue of reliability. In a Canadian jurisprudence that seems so uniformly stacked against Mr. Big targets it is something of a shock to see a dictum this favourable to the defence.

It is submitted that a further contentious issue arises in paragraph 69: in essence Rosenberg J.A. states that Doctor Ofshe's evidence is not about "matters on which ordinary people are unlikely to form a correct judgment" and also that what the psychologist was attempting to provide evidence on, i.e. the motive for a false confession, was "obvious" and that there were "no myths to be dispelled" arising from the Mr. Big evidence to be presented in Osmar's case.

Here it is emphasized again that the problem with this assessment, as with the assessments made by other judges in their rulings to exclude expert evidence in other Mr. Big cases,¹⁸² is that it is in direct conflict with the succinct finding of law made by Iacobucci J. which, ironically, the Court of Appeal cites in this very judgment:

As to the first theme, unfortunately Dr. Ofshe did not provide any information as to why lay people, such as jurors, have difficulty believing that an innocent person would confess to a crime they did not commit. I note, however, that the Supreme Court recognized this phenomenon in *Oickle* at para. 34:

¹⁸¹ i.e. Doctor Ofshe.

¹⁸² such as *R. v. Bonisteel* which will be examined later.

In this context, it may seem counterintuitive that people would confess to a crime that they did not commit. And indeed, research with mock juries indicates that people find it difficult to believe that someone would confess falsely.¹⁸³

How can it be said that the motivations for falsely confessing in a Mr. Big sting are obvious, that there are no myths to be dispelled and that it is unlikely that people will not form a correct judgment? How can these blanket statements stand unqualified in the face of the Supreme Court of Canada statement?

One might argue that as a matter of fact all natural phenomena, whether physical or social, are ‘obvious’ when they are elucidated by an expert. It is, for example, obvious that the earth travels around the sun when that phenomenon is properly explained by astronomers and physicists. However, for millennia it was assumed in many cultures that the sun travelled around the earth because that was the way it appeared. Among people living in Canada today it is well-known that the earth revolves around the sun. The geocentric myth has been dispelled even though it may appear to the untutored that the sun is a disc or ball that travels across the heavens. However, to say that the heliocentric model is obvious would be something of a stretch. Only with the proper scientific explanation does it become clear and obvious to the layman that certain principles of astronomy and physics prove that the earth in fact revolves around the sun.

In the same way a trier of fact is capable of knowing on one level that a false confession could occur in a Mr. Big sting. Everybody knows that people tell lies. However, without proper expert opinion evidence it is too much to say that the phenomenon is “obvious”. False confessions are a complex subject. The judgment in

¹⁸³ *Osmar (C.A.)*, *supra* note 8 at para. 57.

R.v. Oickle makes it clear that there are myths that need to be dispelled about false confessions, it is indeed necessary to face up to what is *counterintuitive* to use Iacobucci J.'s word.¹⁸⁴ To dismiss expert evidence as unnecessary in the manner in which the Ontario Court of Appeal did in *Osmar* is an untenable decision both in light of logic and *stare decisis*.

Another contentious Mr. Big expert evidence issue that the Ontario Court of Appeal touches on appears in paragraphs 59, 64 and 69 of the lengthy passage cited above. In essence this issue is the fact that while significant social science research has been conducted on the topic of false confessions in the context of formal police interrogation, quantitative and controlled study or experimentation has never been done on the existence of false confessions as they may happen in a sting situation like Mr. Big.

This state of affairs has been detrimental to the defence's ability to call expert evidence. Like Rosenberg J.A. in paragraph 69 of *Osmar*, judges may rule that expert evidence that is rooted in a formal police interrogation context simply has no application in a Mr. Big sting. Also, as the *Voir Dire* Judge in *Osmar* found, it may be that Mr. Big expert evidence may be regarded as "novel science" and hence subject to closer scrutiny. Rosenberg J.A. noted this in paragraph 64.

The ramifications of this problem are significant. In short, it would seem to be nearly impossible to simulate a Mr. Big sting for the purpose of psychological experiments. Only a few of the salient features of this problem will be touched upon in this thesis; partially in the interests of brevity; but mostly because the problem has been so thoroughly and intelligently discussed in a fairly recent scholarly article entitled

¹⁸⁴ *Oickle*, *supra* note 57 at paras. 34-46.

“Deceit, Betrayal and the Search for Truth: Legal and Psychological perspectives on the “Mr. Big” Strategy” by Timothy E. Moore, Peter Copeland and Regina A. Schuller.

In the part of the article that focuses on the psychological problems inherent in a Mr. Big sting, Moore et al note that manipulation and social control have been the subject of scientific research for decades.¹⁸⁵ They also comment on the apparent willingness of individuals to perform any manner of inhumane acts when commanded to do so by an authority figure, such as occurred in the infamous Milgram experiments.¹⁸⁶

With respect to the question of scientific research on Mr. Big, the writers note that any proposed experiment to simulate a Mr. Big sting would inevitably raise significant ethical problems along the lines of those that dogged Stanley Milgram’s experiments after the fact. Milgram convinced unwitting volunteers to administer what the subjects thought were electric shocks to third parties visible through a glass window. Milgram would convince the volunteers to give larger and larger shocks to the third party subjects until the third party subjects appeared to be in real agony or even unconscious. The people being apparently shocked were actually actors and the people being ordered to give the shock were the real subjects of the experiment. In a nutshell, Milgram, within whatever margin of error was present in his study, proved that most people (a minority of subjects would not comply with his commands) will follow the orders of an authority figure even under bizarre and immoral circumstances.

The willingness to obey an authority figure, either in the defined Canadian legal sense or using a looser definition, could be said to have ramifications in any discussion of

¹⁸⁵ Timothy E. Moore, Peter Copeland & Regina A. Schuller, “Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the “Mr. Big” Strategy” (2009) 55 C.L.Q. 348 at 379.

¹⁸⁶ *Ibid.* at page 380.

the law of admissions, however, the point that Moore et al are more keen to make is that experimentation relating to Mr. Big will entail many of the same ethical problems Milgram experienced. After his study was completed it became clear that many of his volunteer subjects had been harmed by the experience because they had been tricked into committing acts that were immoral – of course this caused psychological distress.¹⁸⁷

The point is that Mr. Big stings are extremely manipulative and any attempt on the part of a psychologist to simulate one would be equally manipulative. Moore et al note that

[t]he impossibility of setting up an ethical experiment that replicates the effects of Mr. Big is itself a commentary on this extraordinarily manipulative technique. It is, therefore, appropriate for psychologists to reason by analogy and experience, where they cannot ethically conduct direct experiments. The inability to do a proper experiment should in no sense disqualify psychology from making a contribution to the issue.¹⁸⁸

It is submitted that Moore et al's argument for inclusion is sound. It is further submitted that the reasoning underlying the courts' reluctance to admit expert evidence because of its status as novel science is specious. Essentially, judges state that the evidence of a psychologist who specializes in false confessions lacks relevance or value because it is grounded in studies of formal police interrogations or, in any event, interrogations that are not Mr. Big stings. One could again consider the analogy of an accident reconstructionist who has much experience examining the remains of accidents at standard four-way ninety-degree intersections. In a case involving a T-intersection or an unusually angled intersection or an intersection on a hill or land that is otherwise not flat

¹⁸⁷ *Ibid.* at pages 395-396.

¹⁸⁸ *Ibid.* at page 398.

it is hard to imagine a judge in Canada refusing to admit the evidence on the ground that it is novel science and subject to special scrutiny because the landscape in which the accident occurred was out of the ordinary.

The lasting effects that can be visited upon the psyche, and which thus make conducting ethical, controlled, experimental simulations of Mr. Big difficult for psychologists are evident in the recent Newfoundland and Labrador Court of Appeal Judgment *Re Jennifer Hart*.¹⁸⁹ Jennifer's husband, Nelson Hart, was convicted in 2006 of murdering his two daughters. His appeal is presently underway. Apparently the revelation that he had been the target in a Mr. Big sting came as a considerable shock to Hart.¹⁹⁰ The unmasking of the undercover operation has considerably hampered Hart's defence in that he has apparently become deeply paranoid, trusting nobody, to the point that the Court of Appeal has found it necessary to appoint *amicus curiae* on Hart's behalf:

[14] Although Mr. Hart gave an indication in writing that he intended to attend the January hearing and oppose the appointment for *amicus*, he in fact again refused to leave his cell or participate. The Court heard and granted the Crown's application to appoint an *amicus*, notwithstanding Mr. Hart's written objections. In reasons for decision filed on February 12, 2009, Wells, C.J.N.L. explained:

[29] The record establishes, as significant relevant circumstances, the following:

- Mr. Hart's acknowledgment of his inability to prepare for and present his appeal;
- Mr. Hart's seeming inability or unwillingness to identify counsel he is prepared to accept and who will be prepared to represent him;
- Mr. Hart's demonstrated apprehensions that virtually all

¹⁸⁹ 2011 NLCA 64, 312 Nfld. and P.E.I.R. 44 [*Re Jennifer Hart*].

¹⁹⁰ *Ibid.* at para. 7.

activities undertaken by anybody in connection with this appeal is somehow participating in another sting being undertaken by the police;

- The concerns expressed by Mr. Hart's mother and Mr. Hart's wife about his inability to proceed properly with his appeal and his desire that it proceed; and
- The concerns expressed by the Crown that if there are valid grounds of appeal they be properly presented to the Court.

I am satisfied that those circumstances warrant this Court appointing *amicus curiae* to ensure that the proposed appeal is, in fact, presented, and that all possible arguments in support of the proposed grounds of appeal, as well as any further appropriate grounds of appeal, are properly presented to the Court. In doing so, *amicus* may make such submissions and further applications to the court as *amicus* considers appropriate to the circumstances.¹⁹¹

Clearly the negative effects on Mr. Hart were significant and they show why traditional experimentation in this area is seemingly impossible. It is therefore submitted that the proposed reasoning by analogy and experience is appropriate when undertaken by psychological experts in the area of false confessions.

Once again, this is not to say that these experts should not be subject to rigorous and comprehensive cross-examination by crown counsel when the time comes at trial. It is then that a prosecutor can and indeed should point out the weaknesses in the evidence, i.e. that no actual Mr. Big psychological experiments have taken place and that the psychologist may be reasoning by analogy.

Another reasoning flaw apparent in some of the Canadian jurisprudence on admissibility of expert evidence in Mr. Big trials relates to the proposed reliance on proper jury instructions in the place of expert evidence. A few cases address this issue,

¹⁹¹ *Ibid.* at para. 14.

but this thesis will focus on only one example, the judgment of the British Columbia Court of Appeal in *R. v. Bonisteel*.¹⁹² The Court of Appeal upheld the trial judge's ruling that the expert opinion evidence was inadmissible and his decision instead to issue a "clear, precise, sharp warning"¹⁹³ to the jury about the dangers of Mr. Big confessions; including their inherent unreliability and the necessity of comparing the details of the confession with the known details of the crime in order to conclude whether or not the confession was genuine.¹⁹⁴ The Trial Judge's warning was as follows:

Central to the Crown's case is a submission that you should be convinced that when the accused told the undercover officer, [Buck], playing the roll of the Big Boss, on October 26th, '02, at Whistler, that he was the killer, that he was telling the truth.

The law has had experience with false confessions of crime generally and with undercover confessions such as the alleged undercover confession of the accused here made on October 26th, 2002, to the Big Boss. It is a fact known to those immersed in the criminal law that sometimes, even those who know they are speaking to a police officer, confess to a crime they have not committed. It happens. Do not think it doesn't. Do not start with the premise that people only confess to crimes they have actually committed. Such a premise is simply wrong and utterly divorced from the reality of what hard experience has brought home to those of us privileged to toil in Her Majesty's courts on a daily basis.

I now move closer to the situation in the case at bar. The law has had experience with the manipulating of targets during an undercover sting such as the sting in the case at bar. Manipulating the target, inducing the target to speak and drawing as much detail as possible from the target, is the essence of an undercover operation of the sort or kind employed here which resulted in the accused's stating to Buck on October 26th, '02, that he killed the girls. I instruct you that great care must be taken by you in considering the veracity or credibility of the accused's statements to Buck on October 26th, pointed to by the Crown as a confession as having killed the victims.

¹⁹² *Bonisteel*, *supra* note 33.

¹⁹³ *Ibid.* at para. 65.

¹⁹⁴ *Ibid.* at para. 66.

As a kind, sort or class of evidence, confessions produced by an undercover operation such as this are viewed as inherently unreliable. They are taken in an atmosphere that makes them highly suspect without independent confirmation of the truth of what the accused has had to say. You must assess the evidence with that starting point in mind and focus on the specific evidence in this particular case, always keeping in mind that, depending upon what you make of the evidence, the evidence throws up a number of reasons why the accused would say to Buck on October 26th, '02, what he did say....

What the circumstances were in ... this particular case under which the accused came to say what he did say to Buck on October 26th, '02, is for you. A confession obtained under oppressive or fearful circumstances may not be reliable. Whether that was the situation in this case is for you. You must be very careful and consider the context, the circumstances and atmosphere in which the October 26th, '02, statement by the accused was made. This accused may have lied to Buck on October 26th for any of a number of reasons, depending on what you make of the evidence.

...

You must proceed with caution, consider everything and be slow to conclude that the accused confessed to a crime he had actually committed.

...

Even more particularly, did the accused tell the Big Boss on October 26th, '02, one or more things that only the killer would know? The other side of that coin is, did the accused get something wrong in his story to the Big Boss – such as the difference you may find it to be between his version of the number of the stab wounds inflicted on the girls and reality – that you would expect the accused to get right on October 26th, '02, if he was, in fact, the killer back in early 1975.

When you are considering information offered to the Big Boss on October 26th, '02, about the killings as perhaps tending to hurt the accused in your eyes, you must take into account the evidence that is before you about sources of information available to the accused other than his having been the killer. Looked at in context, there may, in your eyes, be no sting to what he offered up at all. ...

... You look at what the accused got right and what the evidence says about sources of information for him, or the lack of them, other than his being the killer. You look at what he got wrong, be it the presence or

absence of a chain at the site, presence or absence of houses on the road, or the number of stab wounds, ...¹⁹⁵

[Emphasis added.]

The British Columbia Court of Appeal then cited the Ontario Court of Appeal's decision to exclude Dr. Ofshe's evidence in *R. v. Osmar* on the basis that it did not meet the test of legal necessity.¹⁹⁶ Following that judgment, the British Columbia Court of Appeal then ruled thusly with regard to the issue:

[69] I would adopt the reasoning of Rosenberg J.A. in agreeing with the trial judge in this case that the evidence of the expert was not necessary, in that it did not deal with the specific nature of the evidence in this case, but only with matters about which the jury could form a judgment based on their own experience, assisted by instructions from the trial judge. The reasoning of both Rosenberg J.A. and the trial judge is consistent with the statement of Major J. for the majority in *R. v. D.D.*, [2000] 2 S.C.R. 275, 2000 SCC 43 at para. 584, where he said that expert evidence that "was not unique or scientifically puzzling but was rather the proper subject for a simple jury instruction" was not necessary. See also *R. v. Rogers*, 2005 BCCA 377 at paras. 60-61, 198 C.C.C. (3d) 449.

[70] This decision of the trial judge is entitled to deference: see *R. v. K.(A.)* (1999), 137 C.C.C. (3d) 225 at para. 93 (Ont. C.A.), where Charron J.A. for the Court (on this issue) commented that where the proposed opinion evidence is not technical, such as the engineering principles involved in the construction of a bridge, but is about human behaviour, it is up to the trial judge to make a judgment call about whether the opinion will provide information that is likely to be outside the experience of the trier of fact.

[71] The trial judge in this case made no error of principle and his decision to reject the expert evidence was not unreasonable.¹⁹⁷

Here again we see admissibility denied on the basis of necessity. There are some plausible reasons given in this passage to exclude the evidence. However, after

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.* at paras. 67 to 68.

¹⁹⁷ *Ibid.* at paras. 69 to 71.

subjecting those reasons to further analysis, it is submitted that the case was arguably wrongly decided.

To give the Trial Judge his due, it is clear that the warning to the jury about the inherent unreliability of Mr. Big confessions was clear, thorough and not lacking in gravity. Upon reading it one is left with no doubt that he brought home to the jury to the best of his ability the need to view the target's confession to Buck with great scrutiny. Indeed, it may well be hard to argue that this particular accused did not receive a fair trial in that respect.

However, despite the admonition of this conscientious Trial Judge, it is submitted that the courts are headed down an inappropriate path in relying on jury warnings with respect to this issue. As previously stated, in an area of law where the existence and danger of false confessions are acknowledged by all, the question arises as to why it is necessary on one hand to warn the trier of fact of their existence, while simultaneously on the other hand excluding all expert evidence opinion about them? What we end up with in a case like *R. v. Bonisteel* is a trial judge, however learned and well intentioned, in fact taking upon him or herself the role of the provider of expert opinion, essentially giving evidence him or herself from the bench.

No doubt the Trial Judge in *Bonisteel* knew what he was talking about, but the fact remains that our courts are committed to the adversarial system. If there is a right to trial by jury then it is submitted that there surely must be a right to have all of the important evidence submitted to the adversarial approach. When a judge essentially gives expert opinion from the bench, neither the defence nor the prosecution have the ability to flesh out all of the important information. Neither have the ability to cross-

examine to show the evidence to the best advantage of their client. Indeed, in the final analysis, if the extant information on false confessions is of such gravity, what defensible reason can there be to exclude it, especially when one concedes, as the Ontario Court of Appeal appeared to do in *Osmar*, that it likely meets the test of legal relevance.

Another problem with the approach in *Bonisteel* is that it opens up the contentious area of proper jury instructions. It is a truism that the area of jury instruction has become fraught with debate over propriety and formality over the years, giving rise to a need for lengthy tomes containing lists of formulaic juridical incantations, not to mention years of appeals over unfortunate slips of the judicial tongue. It is submitted that adding yet another duty, i.e. the crafting of a thorough jury instruction on an important evidentiary issue, to the trial judge's long list of grave responsibilities in a lengthy and contentious Mr. Big murder trial is not warranted when a qualified psychological expert can be called to the witness stand, examined, cross-examined and listened to by the jury. Indeed, even then a trial judge may choose to bring to the jury's attention those points raised by the psychologist which he or she considers most salient during his or her final address to them. With all due respect to the Courts of Appeal of British Columbia and Ontario, it seems as though there is no reason not to do this.

As previously alluded to, there are a very few Mr. Big cases where expert evidence has been admitted at the instance of the defence to give an opinion on the reliability of the Mr. Big confession evidence. In *R. v. O.N.E.*¹⁹⁸ E.R.A. Edwards J. considered expert evidence from both the Crown and the defence on a voir dire to determine the admissibility of the target's statements to Mr. Big, but the jury did not hear

¹⁹⁸ *O.N.E.*, *supra* note 13.

the expert evidence. Another case, a judge-alone trial in which the judge admitted expert evidence, was *R. v. C.K.R.S.*¹⁹⁹

R. v. C.K.R.S. is a truly comical read concerning a Mr. Big target who made such outlandish claims about his abilities and experiences to undercover police officers during his sting that one wonders how the matter ever made its way to trial. Significantly, Morrison J. considered the expert opinion evidence of Doctor Shabehram Lohrasbe in reaching her verdict of not guilty, although even without the expert evidence a verdict of guilty seems nearly impossible on the facts of the case. Morrison J. summed up Doctor Lohrasbe's evidence as follows:

[86] The position of the defence is that Mr. Smith did not do this, that he is a pathological liar.

[87] Mr. Smith himself did not testify. However, the defence did call Dr. Shabehram Lohrasbe, an expert forensic psychologist with special expertise in the area of false confessions.

[88] It is the position of the defence that Mr. Smith is someone who tells whoppers, big lies; that he is grandiose and flamboyant, and cannot be believed. That he was trying to please someone he considered to be Mr. Big of a crime family, and he was prepared to answer to whatever he thought they wanted to hear.

[89] Dr. Lohrasbe interviewed Mr. Smith, but he was not called to give any opinion with regard to whether or not the accused himself had made a false confession. The doctor was called to testify only as to the nature of a false confession, and to confirm that they do exist.

[90] His evidence was that there are three types of false confessions: ones made voluntarily; ones that are coerced compliant, often in the context of a police interview, where a person might be worn down; and third, coerced internalized, where a person may have a low IQ or be brain damaged or psychotic.

¹⁹⁹ *C.K.R.S.*, *supra* note 13.

[91] What is the likelihood of a false confession? Dr. Lohrasbe said there are three variables that must be looked at. First, the character of the individual in that some people have characteristics that make them more likely or suggestible. Second, the circumstances, is the person tired, on drugs, alcohol; and third, does the interviewer have certain expectations and/or desire for a particular outcome. In such a circumstance, shaping the answers may occur, by the nature and the timing of the questions asked and the answers that are flowing from the previous questions.

[92] With regard to the character of the individual, a person may have a degree of cognitive dysfunction, as in low intelligence or poor memory, or may have a propensity to lie and lie habitually. That person may be comfortable in doing so in order to gain something. The reward may be spelled out or indicated.

[93] In his interview with Mr. Smith, Dr. Lohrasbe saw no indication of any gross cognitive dysfunction. He was asked if substance abuse might play a role in truth telling, and said that if someone were seriously addicted, they might do anything to get their substance of choice. He confirmed that economic status might play a role and possibly a criminal background where someone might not wish to go back to jail.

[94] Dr. Lohrasbe spoke of grandiosity, describing it as “boastful to the extreme”. He said that Clarence Smith is “clearly grandiose”; that he also borders on being delusional. For example, he believes he has mystical healing powers over others.

[95] When asked if poverty and addiction could increase the likelihood of someone giving false information, he agreed.

[96] On the concept of shaping, Dr. Lohrasbe explained that in a normal discourse, people talk without a preconceived agenda as to where the conversation might go and there would be no power differential between the two speakers. However, where there is a clear power difference, and the person in power has a preconceived agenda as to what the answers he or she may want, there are ways of shaping an answer consciously or unconsciously. The person may be asked, “Are you sure?” The person answering may want to give an answer that pleases. The more shaping there is, the less reliable are the answers.

[97] In viewing the video and the transcript of the lengthy conversations between the accused and Mr. Big, there is certainly evidence of shaping, although here I confess my sympathy for the job that Mr. Big was trying to do. On the one hand, showing extreme courtesy and respect to Clarence Smith, who was doing some bizarre rambling at times, and on the other hand, trying to get Mr. Smith to focus in a certain direction.

[98] In his interview with Clarence Smith, Dr. Lohrasbe found Smith to be a real character and a raconteur, someone who obviously enjoys people and is flamboyant. He seemed to have a tremendous confidence in himself and was unquestionably grandiose. However, it was difficult to get information directly from him. Smith was evasive generally and would drift off to other areas.

[99] Clarence Smith told Dr. Lohrasbe he had knowledge of the murder from information given to him by police in the prison. However, two senior officers testified that they were with Smith less than a minute in 1997 when they went to Matsqui Prison to interview him, and no information was given out by the police officers at that time. However, the defence points to Exhibit 30, which was several pages sent by one of the detectives to Mr. Smith's parole officer in March 1998. Those pages outline the evidence from Mr. Zytaruk and Lawrence Kowalko.²⁰⁰

It is submitted that it is difficult to see how opinion evidence such as that put forth by Doctor Lohrasbe is inimical to principles of fundamental justice.

A final judgment in which expert opinion evidence played a part is *Unger v. Canada (Minister of Justice)*,²⁰¹ which was actually a ruling on an application for habeas corpus. In this case Unger was released on conditions imposed by the Manitoba Court of Queen's Bench pending a ministerial review of his conviction for the murder of Brigitte Grenier. This case does not include a ruling on the admissibility of expert evidence. Rather, it considers a decision taken by the Federal Minister of Justice to enlist the aid of an expert on false confessions to determine whether or not Unger confessed falsely to Grenier's murder and use that expert's opinion in determining whether or not the conviction should be overturned pursuant to section 696.1 of the *Criminal Code*. The Court's observations on the use of the expert are as follows:

²⁰⁰ *Ibid.* at paras. 86-99.

²⁰¹ 2005 MBQB 238, [2005] M.J. No.396 [*Unger v. Canada*].

[6] The crown continues to rely on Mr. Unger's confession to the police during the undercover operation to support its position that it has a strong case against Mr. Unger and that he should not be released pending his review. The Criminal Conviction Review Group of the Department of Justice, which is conducting the investigation into Mr. Unger's application for ministerial review, has suggested that Mr. Unger's confession be reviewed by Dr. Gudjonsson, an expert on false confessions, and Mr. Unger has agreed to co-operate. Due to Mr. Gudjonsson's schedule, it is expected that this review will take many months.

.....

[14] The crown takes the position that the confession is unaffected by the removal of the other evidence. Contrary to that position, however, the reliability of the confession is being questioned by the committee undertaking the investigation on behalf of the Minister, at least to the extent that the investigators have suggested, and will be paying for an expert in false confessions to review and provide an opinion on its reliability.

.....

[48] There is, however, strong evidence that the applicant's conviction may not be sustainable, which I have already reviewed. Two pieces of evidence, being the hair sample and the confession to the jailhouse informant, have been withdrawn by the crown. The only remaining evidence is the accused's confession to the undercover police, which is fraught with serious weaknesses and which the investigators have suggested should be assessed by an expert in false confessions. If that report concludes that the confession was false, there will be no evidence against Mr. Unger.²⁰²

As has been evidenced by subsequent events, i.e. the quashing of Unger's guilty verdict and his release from prison, it seems apparent that his confession was found not to be reliable enough to ground his conviction.

Of course the findings of Dr. Gudjonsson and subsequent decisions of the Minister of Justice regarding Kyle Unger's guilt or innocence do not carry any weight as binding precedent upon the courts. However, it is of some gloomy significance that only when all appeals have been exhausted and enormous amounts of time and energy have

²⁰² *Ibid.* at paras. 6, 14 and 48.

been expended will the federal executive branch of the criminal justice system intervene to ensure that a falsely accused and wrongfully convicted target has the benefit of the weight of a qualified expert's opinion on the phenomenon of false confessions.

It is submitted that Kyle Unger is ironically quite fortunate in that the Mr. Big confession he gave *was not* the only evidence against him at trial. As previously mentioned in the first chapter of this thesis, the case against Unger also included DNA evidence of a hair left at the scene of the crime that ultimately turned out to be faulty, as well as jailhouse snitch evidence to the effect that he admitted the crime to one of his cellmates. The effect of the collapse of the other two components of the case against Unger threw the verdict onto far shakier ground and led to renewed public scrutiny of his confession as well as of the validity of the conviction itself. It is arguable that had he been initially convicted of the crime on the basis of the Mr. Big confession alone, as is the case with so many targets now serving life sentences in Canada for murder, Kyle Unger would still be in prison for a crime that he did not commit.

Indeed, Unger's ultimately fortunate position as a target who had been found guilty on the basis of weak and unreliable evidence beyond his Mr. Big confession is underscored when one considers the problematic nature of proving such confessions false as identified by Moore et al in their article. They point out that in the context of usual false confessions arising from traditional police interrogations there is an at least somewhat measurable incidence of "demonstrated false confessions".²⁰³ E.g. and hypothetically, we can consider a case involving an accused confessing to raping and strangling a murder victim. It may be that further investigation reveals that the accused's

²⁰³ *Moore et al, supra* note 185 at 401.

DNA does not match the DNA of the flesh and skin of the attacker found under the victim's fingernails or of the semen in her vagina. In this way the confession is proved to be false. The problem in Mr. Big cases is that, since there is no other physical evidence in the vast majority of the situations in which the sting is used, it is nearly impossible for researchers to demonstrate a false confession and, therefore, a quantifiable rate of false confessions. This, along with the ethical limitations outlined above, contributes to the dearth of established scientific research on Mr. Big.²⁰⁴ That said, it is surely not debatable that absence of evidence of a false confession is not evidence of its absence, especially in a criminal justice system that so freely admits the phenomenon of their existence.

As a coda to the discussion on expert evidence in Mr. Big stings it is necessary to note a further obstacle to admissibility that appears to have arisen in the very recent British Columbia Court of Appeal judgment in *R. v. Earhart*.²⁰⁵ In this case Madam Justice Bennett stated as follows for the court:

[82] Ms. Earhart argues that expert evidence should be permissible on the threshold question of whether the statements should be admitted. Ms. Earhart did not attempt to tender expert evidence, no doubt because the issue was determined by this Court in *Bonisteel* at paras. 67-69. Following *Osmar*, this court held that expert evidence on the topic of false confessions was not admissible in the context of the “Mr. Big” scenario. As Ms. Earhart did not seek to tender expert evidence in the trial court or as fresh evidence on appeal, I need not say anything further about this submission.

It is submitted that the court may well have made the right decision in the particular circumstances of Earhart's case. However, the general statements of law contained in

²⁰⁴ *Ibid.*

²⁰⁵ 2011 BCCA 490, 2011 B.C.J. No. 2286 [*Earhart*].

this passage, i.e. that the issue of admission of expert evidence in Mr. Big cases was determined in *R. v. Bonisteel* and that that determination is that it is not admissible in keeping with the Ontario Court of Appeal's ruling in *R. v. Osmar*, are broadly erroneous. In the first place, although the British Court of Appeal in *Bonisteel* did follow *Osmar* and indeed did not overturn the trial judge's decision to exclude expert evidence,²⁰⁶ they did not use the sort of language that indicates a "determin[ation]" that expert evidence in Mr. Big cases should thenceforth be considered inadmissible in the province of British Columbia.

Furthermore, the ruling in *R. v. Osmar*, upon which the British Columbia Court of Appeal relies, is even more equivocal and less determinative of the issue. As previously mentioned, Rosenberg J.A. was not entirely unsympathetic to the target's attempt to have Doctor Ofshe's evidence admitted. Here it is necessary to repeat a segment of the judgment in that case:

[66] I agree with the trial judge's conclusion that Dr. Ofshe's evidence was not admissible in the circumstances of this case. **What I say here should not be taken as a finding that this kind of evidence could never be admitted in other circumstances.** I also intend to limit my analysis to whether the evidence meets the necessity requirement for admission of expert evidence. I tend to agree with the appellant that the trial judge may have taken too narrow a view of the possible relevancy of the evidence by focusing solely on its value in determining the appellant's credibility. Dr. Ofshe's evidence was broader than that and went to the question of the reliability of the appellant's statements to the undercover officers in the context of the Mr. Big strategy. This would have been an issue in the case, even if the appellant did not testify.²⁰⁷ (emphasis added)

²⁰⁶ which, incidentally, probably says more about the deference owed to trial judges' findings by appellate tribunals than it does about the law of expert evidence *per se*.

²⁰⁷ *Osmar (C.A.)*, *supra* note 8 at para. 69.

Clearly the Ontario Court of Appeal leaves the door open for admission of expert evidence in cases underlain with different circumstances. Furthermore, it is necessary to recall that Rosenberg J.A. found specific fault with Doctor Ofshe's testimony, i.e. his failure to explain why lay people have difficulty believing that accused persons may falsely confess. If Doctor Ofshe's evidence had been different, it stands to reason that his evidence may well have been admissible.

Bearing the above observations in mind, it is submitted that Madam Justice Bennett's ruling that the issue is determined, i.e. determined that expert evidence on false confessions in Mr. Big cases is inadmissible, is incorrect. That said, her ruling on the issue is quite brief and may indeed be subject to some elucidation in the future.

In conclusion, previously in this thesis it was proposed that expert evidence may prove to be the "chink in the armour" of Canadian Mr. Big jurisprudence. When one considers that the evidence has been admitted in some cases,²⁰⁸ that the Ontario Court of Appeal has surmised that it may well be relevant and possibly even necessary based on what kind of evidence the expert plans to give,²⁰⁹ and that the Supreme Court of Canada

²⁰⁸ Possibly including the aforementioned contentious case of *McIntyre (C.A.)*, *supra* note 79, in which passing reference to the evidence of a "Doctor MacKay" and his testimony relating to the target's statements during *Operation Javelot* is made at page 16 thereof. Of course, as previously stated, *R. v. McIntyre* is likely not a Mr. Big case at all even though it is cited as such by our courts in their rulings that Mr. Big stings should not be held to be abuses of process.

²⁰⁹ With regard to the question of what kind of evidence an expert plans to give, the fairly recent case of *R. v. Abbey*, 2009 ONCA 624, 246 C.C.C. (3d) 301 may also end up being relevant in future Mr. Big cases. In *Abbey*, a murder case, the Crown proposed to call expert evidence from a sociologist, Dr. Totten, about the meaning of a teardrop tattoo under the respondent's eye, with a view to establishing that it meant he had killed someone. The Trial Judge excluded the evidence. The Ontario Court of Appeal unanimously ruled that this was an error, stating, among other things, at para. 109, that most expert evidence can't be scientifically validated and that all kinds of experts do not "support their opinions by reference to error rates, random samplings or the replication of

has yet to rule on its admissibility, that characterization may prove to be true. Indeed, it is submitted that Moore et al in their article are quite correct in their exhortation to defence counsel to continue their efforts to have expert evidence admitted.²¹⁰

test results. Rather, they refer to specialized knowledge gained through experience and specialized training in the relevant field”.

Furthermore, the Court of Appeal noted at paragraph 117 that the question of admissibility should not be decided on the basis of its quantitative scientific validity, but rather on the basis of the existence of specialized knowledge.

Finally, it was also noted, at paragraph 121, that “The study of cultural mores within particular communities or groups in a community is a well-recognized field of study within the broader academic and professional disciplines of sociology, criminology and anthropology”. This statement could be applied to the research of Drs. Leo and Ofshe on deception, coercion and obedience to authority.

It will be interesting to see how much impact this judgment has on future attempts to introduce expert evidence in Mr. Big cases.

²¹⁰ *Moore et al, supra* note 183 at pages 402 to 403.

CHAPTER SIX – HEARSAY AND ADMISSIONS

The issue of whether or not Mr. Big evidence should be admissible or inadmissible based on how it stands up to scrutiny under the law of hearsay and admissions definitely merits some examination.

As is the case with other areas of law in relation to Mr. Big, this question of admissibility has mostly been addressed in and by the Supreme Court of British Columbia and the British Columbia Court of Appeal. That said, the courts of other jurisdictions have also weighed in on the matter, resulting in some apparent divergence in the law between provinces.

In examining this aspect of Canadian legal treatment of the Mr. Big sting it is initially necessary to identify exactly what the nature of the evidence is. The issue is whether the highly inculpatory statements made by the target to undercover operatives are properly admissible when one considers the following facts. Firstly, they are out-of-court statements put forward by the prosecution as evidence of the truth of their contents. Secondly, they are also admissions made by a party to the proceedings and are therefore presumptively admissible as evidence by operation of law.

The questions often raised by judges are whether or not admissions are hearsay, whether they should be treated differently than other forms of hearsay, and whether or not they should be subject to the same relatively recent developments in hearsay law known as the “principled approach”. To put it in the briefest possible terms, the

principled approach to hearsay was first established in *R. v. Khan*.²¹¹ Since then it has been expanded and fleshed out in cases such as *R. v. Starr*²¹² and *R. v. Khelawon*.²¹³

In *Khan* it was established that in addition to instances in which it falls under a traditional exception to the hearsay exclusion, a hearsay statement may be admitted into evidence if the party adducing the statement can prove that it is both necessary and reliable. In the interests of brevity, detailed discussion of how to define those two terms will not be undertaken.

Starr expanded this rule. The Court in this case ruled that, in addition to previously inadmissible evidence now acquiring the possibility of admission if it finds approval under the principled approach, it would thenceforth be necessary for hearsay evidence fitting within the traditional exceptions to pass the test of the principled approach as well. That said, the traditional exceptions were still to be accorded significant weight, and hearsay statements falling within them were still to be considered presumptively admissible.

In Mr. Big cases the proposition put forward by defence counsel is that statements made by targets during the sting constitute hearsay, that they are therefore subject to the principled approach and that they do not pass the test of reliability due to the circumstances surrounding their making. Specifically, the statements are made in an atmosphere of oppression and the threat of violence. Additionally, the statements are also arguably induced in an atmosphere of the expectation of wealth, power and social acceptance.

²¹¹ *Khan, supra* note 59.

²¹² 2000 SCC 40, 2 S.C.R. 144 [*Starr*].

²¹³ 2006 SCC 57, 2 S.C.R. 787 [*Khelawon*].

Having briefly commented on²¹⁴ the law of hearsay and the principled approach, it is also necessary to say something about the species of evidence known as the admission. The admission fits into the Canadian legal taxonomy much as the platypus fits into the mammalian taxonomy; it has enough characteristics to be defined by scholars as one thing, but it looks and acts like a lot of other things as well.²¹⁵ Sopinka J. in *R. v. Evans*²¹⁶ made the following statement, which is often cited in admissions cases and is arguably the controlling definition today:

The rationale for admitting admissions has a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all. The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. As stated by Morgan, "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of oath" (Morgan, "Basic Problems of Evidence" (1963), pp. 265-66, quoted in *McCormick on Evidence, supra*, at p. 140). The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases.²¹⁷

The above statement is rich in context and meaning, and it is important to understand it fully in order to accurately assess how Mr. Big target statements should be viewed in light of the law of hearsay and admissions.

In the second sentence of the passage Sopinka J. suggests that admissions are not hearsay at all. Such uncertainty is unusual and has given rise to much subsequent judicial speculation. However, the sentence preceding it would seem to establish that it is indeed

²¹⁴ one hesitates to say 'defined'.

²¹⁵ Also like the platypus, the admission appears to be in no danger of extinction.

²¹⁶ [1993] 3 S.C.R. 653, 85 C.C.C. [3d] 97 [*Evans* cited to S.C.R.].

²¹⁷ *Ibid.* at page 664.

a hearsay exception, just one that is distinct from the others. The distinction means that independent circumstantial guarantees of trustworthiness are not sought out to justify its admission. That said, it is important to point out that the guarantees adverted to by Sopinka J. here are almost certainly not the same as those sought out in today's courts under the reliability arm of the "principled approach". Sopinka J.'s statement was made seven years before the release of *R. v. Starr* which determined that traditional hearsay exceptions should be subject to the principled approach. What Sopinka J. is referring to as guarantees of trustworthiness are those that are assumed to inhere in the traditional hearsay exceptions. *R. v. Khan* was not cited by His Lordship in *R. v. Evans* as it and the principled approach it promulgated simply were not relevant at the time.

In 1993 admissions were undoubtedly admissible due to their relation to the theory of the adversary system. The theory of the adversary system does not comprehend independent guarantees of trustworthiness. Its rationale with regard to admissions is that it is unfair to the opposing side for a declarant/party to claim a disadvantage because he or she cannot cross-examine him or herself, or to claim that his or her statements are not believable except when made under oath.

R. v. Khan initiated a dramatic change in the law of hearsay in its creation of the principled approach. *R. v. Starr* initiated a further significant change in the area by applying that principled approach to traditional exceptions. The question then arose as to whether or not it ought to apply to admissions by a party. Pre-*Khan* and -*Starr* they were admissible in the absence of any circumstantial guarantees of trustworthiness, but post-*Khan* and -*Starr* can they truly be said to be admissible in the absence of any indicia of reliability under the principled approach? The 'theory of the adversary system' would

certainly seem to be one of the rigid and inflexible categories that the principled approach was meant to modify. Furthermore, despite his apparent misgiving, Sopinka J. does indeed identify the admission as a hearsay exception. As such should it not be included in the principled approach?

A final Supreme Court of Canada judgment to be touched upon before examining the relevant Mr. Big cases is *R. v. Khelawon*.²¹⁸ Although concerned with hearsay and the principled approach, this case makes the following one-paragraph-long reference to admissions:

Some of the traditional exceptions stand on a different footing, such as admissions from parties (confessions in the criminal context) and co-conspirators' statements: see *Mapara*, at para. 21. In those cases, concerns about reliability are based on considerations other than the party's inability to test the accuracy of his or her own statement or that of his or her co-conspirators. Hence, the criteria for admissibility are not established in the same way. However, in cases where the exclusionary rule is based on the usual hearsay dangers, this distinction between the two principal ways of satisfying the reliability requirement, although not by any means one that creates mutually exclusive categories, may assist in identifying what factors need to be considered on the admissibility inquiry.²¹⁹

Although this passage affirms the status of admissions as different from other types of hearsay and states that concerns about its reliability are based on "other considerations", it is a fairly oblique statement of law – e.g. it does beg the question as to what those other considerations are. It does not help that the Court is commenting here on admissions from an accused and admissions by a co-conspirator in the same judicial breath. Furthermore, although the passage does state that admissions are a different breed of hearsay it does indeed assume "concerns about reliability". This of course is in

²¹⁸ *Khelawon*, *supra* note 213.

²¹⁹ *Ibid.* at para 65.

significant contrast to Sopinka J.'s pre-*Starr* statement that admissions of a party are admissible without any examination of their "circumstantial guarantees of trustworthiness". It may be that the passage causes confusion on a peripheral matter²²⁰ and should simply be regarded as *obiter dicta*.

In examining the Mr. Big cases it is helpful to point out initially that, regardless of whether targets' statements to undercover officers are considered to be true hearsay exceptions or not, the defence arguments that they should be excluded have failed in every jurisdiction in which they have been put forth at both trial and appeal levels. However, they have failed at different times and in different places for different reasons.

When hearsay arguments were made in the Alberta Court of Appeal in the case of *R. v. Wytshyn*,²²¹ the new modifications to the law of hearsay set out in *R. v. Starr* were very new. Indeed, *Wytshyn* was released only 46 days after *Starr*:

[6] Wytshyn argues that even though the statements are presumptively admissible under one of the common law exceptions to the hearsay rule, the trial judge was still required to go on, given the Supreme Court of Canada decision in *R. v. Starr*, [2000] 2 S.C.R. 144, and consider whether they met the required degree of threshold reliability. Wytshyn claims that the statements did not. He asserts that the circumstances under which they were made raise the issue of threshold reliability. In the end, this assertion rests mainly on two arguments: first, that Wytshyn had a motive to lie, namely to prove himself to the criminal organization, and second, that he was offered inducements, that is assistance in framing Wes Arnold and thereby exonerating himself.

[7] We cannot agree with these claims. We do not see anything in the circumstances of this case which diminishes the presumptive admissibility of Wytshyn's statements. It must be remembered that we are dealing with threshold reliability of the subject statements and not their ultimate reliability. The former is for the trial judge (and thus this Court), and the latter for the trier of fact. While there will be rare cases in which the principled approach will result

²²⁰ i.e. peripheral to Mr. Khelawon and his situation.

²²¹ 2002 ABCA 229, 55 W.C.B. (2d) 654 [*Wytshyn*].

in the exclusion of statements, even though they fall within one of the recognized common law exceptions, this is not one of them.

[8] To put this another way, Wytshyn has not met the evidentiary burden on him to justify excluding these otherwise admissible statements. The circumstances in which the statements were made lend sufficient credibility to allow a finding of threshold reliability. In this regard, we cannot ignore the fact that Wytshyn made these inculpatory statements knowing that it was important that the information he disclosed be accurate and consistent with the results of the police investigation. In other words, from Wytshyn's perspective, he had a motive to tell the truth, that is a reason to talk about what happened but not to lie about it. Thus, even had the trial judge had before him the *Starr* decision, a decision of the Supreme Court of Canada released after trial, it would have not changed the result on this issue. We therefore dismiss this ground of appeal.²²²

The Alberta Court of Appeal does not refer to Sopinka J.'s statement about the nature of admissions and whether they should be dealt with as distinct from other forms of hearsay. They do, however, clearly state that the statements made by the target in this case pass the test of threshold reliability and that they were properly admitted. The finding of threshold reliability is made on the basis of what the Court found to be a strong motivation to tell the truth, which is of course in contrast with the defence's argument that the target in fact had a strong motivation to lie.

Ultimately, this rather spare judgment serves mainly to point up the obvious conundrum faced by the court that is required to determine threshold reliability of Mr. Big statements. The prosecution says that the statements are highly reliable hearsay because of the numerous admonitions made to the target to tell the truth, be honest, be open and not lie to Mr. Big. The defence says the statements are highly unreliable hearsay because the target is under so much pressure to tell Mr. Big what he wants to hear, so that the financial and social rewards can continue to come his way, but more

²²² *Ibid.* at paras. 6 to 8.

importantly because he is afraid of the violence that will be visited upon him if he incurs the kingpin's wrath and suspicion by not confessing. It bears mentioning that the defence's argument is bolstered by the existence of numerous instances wherein Mr. Big denies, sometimes angrily, protestations of innocence made by the target during the final interview scenario. Other than the issue discussed directly above, the *Wytyszyn* case also stands for the principle that in the province of Alberta, the admissions exception to the hearsay rule should indeed be subjected to the principled approach to hearsay.

A good place to begin an examination of the history of Mr. Big statements as they relate to the law of hearsay in British Columbia is *R. v. MacMillan*.²²³ *R. v. Starr* had only recently been decided, and Singh J. was alive to the issue of whether or not that changed the admissibility status of Mr. Big sting admissions:

12 Did Starr and Oickle open the door for the application of the principled approach to hearsay evidence to admissions made to undercover authorities? This is possible given the general statements made in Starr and the references in Oickle in paragraphs 28 and 65 to 67.

13 There is uncertainty among legal academics and authors, including Wigmore, McCormick and Morgan as to whether admissions are truly hearsay, although all authors discuss admissions under the rubric of hearsay evidence.²²⁴

Singh J. continued on to devote considerable attention to the theories and opinions of different legal scholars on the issue, ultimately deciding that the status of admissions with regard to hearsay had still not been determined.²²⁵ He concluded as follows:

²²³ 2000 BCSC 1614, B.C.J. No. 2907 [*MacMillan (2000)*].

²²⁴ *Ibid.* at paras. 12 to 13.

²²⁵ *Ibid.* at paras. 14 to 20.

21 It is hoped that this uncertainty, perceived or otherwise, as to whether statements made to persons not in authority fall under hearsay evidence and are therefore subject to the principled approach will be resolved by a definitive pronouncement by a higher court.²²⁶

With regard to the fairly typical Mr. Big sting evidence before him, Singh J. did not ultimately furnish an explicit opinion as to whether or not the target's statements needed to meet the standard of the principled approach. However, for reasons not stated outright, but perhaps simply to err on the side of caution, he did in fact subject the statements to a reliability analysis and found that the threshold had been met:

59 The following circumstances satisfy me that the threshold test of reliability has been met:

(a) The accused knew he had to be truthful because it had been repeatedly impressed upon him that the boss of the organization was a powerful individual, was not to be lied to, and that he had means (including police contact) to find the truth, that the condition precedent for membership in the organization was trust, honesty and loyalty and the accused acknowledged this and confirmed that he would not lie;

(b) Throughout the three week undercover operation, the interaction between Cpl. McAndie and the accused was friendly and relaxed. This developed into a bond of trust and closeness to the extent that the accused looked upon Cpl. McAndie as a brother;

(c) Throughout the interaction between the undercover operators and the accused, there was no atmosphere of oppression, intimidation, threats or threats of violence directed against the accused;

(d) No false or fabricated evidence was presented to the accused, nor was the accused overborne by any suggestions that would induce him to lie. The inter-police memo contained factual information;

(e) On many occasions the accused himself initiated contact with Cpl. McAndie which is clearly indicative of his desire and anxiousness to belong to the organization;

²²⁶ *Ibid.* at para. 21.

(f) When requesting false identification, the accused voluntarily disclosed that he had a "beef" hanging over his head and the beef was the murder he committed in November 1997;

(g) The atmosphere in the final interview in which the accused made full disclosure of the murder to Cpl. Knoll was friendly, relaxed and factual. The conversation was skilfully and amicably conducted by Cpl. Knoll so as to eliminate any motive to lie to the accused;

(h) Before every involvement by the accused in the scenarios he was given every opportunity to withdraw without any repercussions.

60 Finally, I have considered paras. 34 to 45 of *Oickle* in which Iacobucci J. canvassed the large body of literature and research concerning false confessions. None of the four kinds of false confessions as stated in para. 37, namely, stress compliant, coerced complaint, non-coerced persuaded, and coerced persuaded occurred in this case.²²⁷

It is an interesting feature of this decision that Singh J. would appear to be the only judge in a Mr. Big case to ascribe any significance to the fact that *Starr* and *Oickle* were released on the same day.

MacMillan had been charged with a second murder and convicted on fundamentally the same evidence in a separate trial. However, that trial had taken place before *Starr*, whereas the trial heard before Singh J. had taken place afterwards. MacMillan successfully appealed this second murder conviction on an unrelated issue and it was re-tried before McEwan J. in 2003. The same argument that the principled approach should apply to Mr. Big admissions was made at this re-trial with the same lack of success.

Like Singh J. in MacMillan's previous trial, McEwan J. cites much authority and learned commentary in his decision, although the commentary is exclusively from

²²⁷ *Ibid.* at paras. 59-60.

English sources and hence, it is submitted, perhaps somewhat lacking in persuasiveness. As far as case law goes, McEwan J. notes that *Evans* is the leading case in Canada with regard to admissions, citing the previously reproduced well-known paragraph in which Sopinka J. questions whether or not admissions are hearsay before affirming their pre-*Starr* admissibility.²²⁸ He then considers a passage from *Starr*, and then a further judgment from the Ontario Court of Appeal, *R. v. Foreman*.

McEwan J. then notes that *Evans* was released prior to *Starr* and that Iacobucci J. did not specifically address it in his reasons in the latter case, but that in any event the instances in which the principled approach would require exclusion of evidence fitting within a traditional exception would be rare.²²⁹ McEwan J. also comments on the different situation in Alberta, referring to the *Wytyszyn* case.²³⁰

Ultimately, McEwan J. goes further than Singh J. and states that *Starr* does not apply to the target's statements:

[32] I do not think *Starr* should be applied to the sort of statement made by Mr. MacMillan. The generalizations in *Starr* which rationalize the traditional exceptions to the hearsay rule within the “principled” approach do not, in my view, override the clear language in *Evans* identifying the rationale for treating admissions by a party differently from other exceptions to the rule. The simple fact that admissions of this kind can be analytically described as hearsay does not bring them under *Starr* in the face of the explicit language in *Evans*. If there were any doubt about this limitation on *Starr*, it is clear from *Foreman*. There is therefore, in my opinion, no need to apply the *Starr* analysis to the statement in this case and it is admissible.

[33] If I am incorrect in that finding and *Starr* does apply, I am mindful of the rule in *In Re Hansard Spruce Mills* (cited above) to the effect that I should not differ from a ruling by another judge of this court, particularly one on the same set of facts, although I am not sure a *voir dire* ruling is a form of final

²²⁸ *R. v. MacMillan*, 2003 BCSC 1705 at para. 13 [*MacMillan* (2003)].

²²⁹ *Ibid.* at para. 14.

²³⁰ *Ibid.* at para. 18.

judgment. Mr. Justice Singh did not address the *Evans* and *Foreman* analysis, so I am able, in any event, to depart from his judgment to address that argument. Respecting the *Starr* analysis, Mr. Justice Singh’s summary of the material facts does not differ significantly from the facts I would have identified.²³¹

Bearing in mind the finding of Singh J., McEwan J. ultimately finds that in any event Macmillan’s statements would indeed pass the test of threshold reliability under the principled approach.²³² One wonders if this immediate ‘hedging of bets’ evident in McEwan J.’s judgment arguably serves to heighten rather than lower the uncertainty surrounding the status of admissions as hearsay in Mr. Big stings.

A final interesting feature of the second *MacMillan* case is the question of whether the admissions made are truly admissions against interest:

[23] Going back to basics, the defence submits that the premise behind the “admissions” exception in the first place was that people would normally not say something inculpatory about themselves unless it were true. In the present case, however, they submit it was clearly in Mr. MacMillan’s perceived interest to convince the “organization” that he was in fact a bad person, capable of killing. There were obvious financial benefits to becoming a member. Cpl. McAndie certainly gave the impression that, while the organization was a “business”, there was a premium on cold-bloodedness. One need only think of Cpl. McAndie’s remarks to Mr. MacMillan that he enjoyed the violent parts of the job in connection with the scenario where he “roughed up” another police operative; or of the conversations about contract killing being “the ultimate trust”; or of the supposed fact that Cpl. McAndie had a ring inscribed with the date on which he suggested he had himself been given that “trust”.

[24] This, the defence submits, completely inverts the presumed reliability of the admissions exception and makes this a clear example of one of those “rare” cases Iacobucci, J. posited in *Starr*, where an established exception would not meet the requirements of the principled approach.

[25] The defence submits that *Wytshyn* (quoted in [paragraph] 17 above) exemplifies the approach and is materially distinguishable on its facts, such that by applying the same reasoning to the present case the result would be in Mr. MacMillan’s favour. There, the police undercover scenario centred on a

²³¹ *Ibid.* at paras. 32 to 33.

²³² *Ibid.* at para. 36.

supposed need for accuracy in the information they were eliciting so that another person could be framed for the crime. As the Alberta Court of Appeal noted, there was a motive to tell the truth. In the present case, the defence submits that there was no such qualification built into the scenario: apart from telling “the Boss” what he understood the Boss probably knew, they say there was no circumstantial guarantee of reliability respecting the details Mr. MacMillan gave, and some considerable motive to embellish, given the supposed nature of the enterprise as described by Cpl. McAndie.²³³

This question of whether or not the admissions made in the course of a Mr. Big sting are truly against the declarant/target’s interest is raised in various other judgments as well.

For example, in *R. v. Lowe*, another British Columbia Supreme Court decision, C.L. Smith J., after briefly referring to the “open question”,²³⁴ of whether or not admissions are hearsay and deciding to follow McEwan J.’s decision in *MacMillan* made the following observation about whether or not targets’ statements are indeed against their interest:

[227] A crucial factor in the determination of that issue is whether Mr. Lowe's statements to the undercover police officers are confirmed by other evidence. There is a high standard to be met. Statements made by someone who is in the grip of a sophisticated undercover operation, subject not only to psychological manipulation and financial inducements but also to threats of physical harm, are highly suspect without independent confirmation. It is the reverse of the usual approach to admissions, which are accepted in evidence, in part, because it is generally assumed that when people make statements against their own interest they are not lying. Here, the statements were made in a context in which Mr. Lowe may have seen it as against his interest not to make them. The Court of Appeal for this province has made clear that such statements should be viewed as inherently unreliable and that it is dangerous to base a conviction upon such statements unless they are confirmed by independent evidence: *R. v. McCreery*, [1998] 8 W.W.R. 699 (B.C.C.A.); *R. v. Forknall*, (2003), 172 C.C.C. (3d) 61 (B.C.C.A.); *R. v. G.W.F.*, 2003 BCCA 230, and *R. v. Skiffington*, 2004 BCCA 291.²³⁵

²³³ *Ibid.* at paras. 23 to 25.

²³⁴ *Lowe*, *supra* note 14 at para. 225.

²³⁵ *Ibid.* at para. 227.

This point was also acknowledged by Williams J. in *R. v. Perovic*, another Mr. Big case from British Columbia:

[25] I am fully cognizant of the extreme caution which must be exercised in dealing with statements of persons made to undercover operators in situations of this nature. I recognize that such undercover operations tend to encourage false bravado and boastfulness in the targets. There is a real concern that the targets will exaggerate their role in any activity. I am aware that the statements thus made are not contrary to the penal interest of the subject but, rather, occur in an atmosphere where there is a pressure upon the subject to claim credit for criminal activity. I recognize that the undercover operators often make generous payments to targets for their performance of apparent criminal activities, that they hold out a powerful inducement of membership in a sophisticated and wealthy organization, and that the target engages in dealings with individuals who are made to appear powerful and capable of great violence.

[26] In summary, I recognize fully that these carefully structured relationships provide substantial inducements to targets to make confessions to crimes and that they create very real concerns that false confessions may be offered.²³⁶

In a previous decision in the same case, Williams J. followed the lead of McEwan J. among others in ruling that the target's admissions were admissible in any event following Sopinka J.'s statement of the law in *Evans* and its subsequent treatment in lower courts.²³⁷ That said, like other judges, Williams J. embarked upon a threshold reliability analysis anyway, presumably due to the general uncertainty surrounding admissions. Like other judges he considered many factors that militated in favour of a finding of threshold reliability. For example, Williams J. considered that the target's statements were not coerced or the product of intimidation; that he willingly participated

²³⁶ 2004 BCSC 1823, 79 W.C.B. (2d) 752 at paras. 25-26 [*Perovic (Ruling No. 2)*].

²³⁷ *R. v. Perovic* 2004 BCSC 643, [2004] B.C.J. No. 3037 at paras. 19 to 20 [*Perovic (Ruling No. 1)*].

in gang activities with no apparent reluctance; that he was subject to the continued emphasis on truth, honesty and loyalty that is common in Mr. Big stings; that he apparently had close bonds with the undercover officers, believed that they were criminals and wanted to show them respect; that, in his confession to Mr. Big, his purpose was to provide accurate details so that inculpatory evidence could be eradicated and not to boast.²³⁸

Williams J. also considered a factor that rarely appears in evidence in Mr. Big stings. Apparently the target in this case discussed his position with regard to the undercover operatives with an unrelated third party, a friend named Sharpe:

After the defendant met with L., he had a discussion with his friend, Adam Sharpe. In that conversation, he described his intense satisfaction that he was being accepted into the gang. While Sharpe expressed a certain degree of concern or suspicion about these men and the wisdom of being so disclosive with strangers, the defendant was unrestrained in his enthusiasm, explaining how completely he trusted and respected them, how he had no doubt they were the real thing, and emphasizing the importance of being truthful with them. It is significant in my view that Sharpe was obviously a person that the defendant valued greatly as a friend. The defendant's statement to Sharpe seems genuine and quite convincingly articulates the defendant's position.²³⁹

Ultimately, Williams J. found that the statements passed the test of threshold reliability and they were admitted.²⁴⁰

Boyd J. in *R. v. Ciancio* also referred to the statement cited above in *Perovic* (*Ruling No. 2*), noting the inherent or manifest unreliability of Mr. Big sting statements

²³⁸ *Ibid.* at para. 22.

²³⁹ *Ibid.*

²⁴⁰ *Ibid.* at para. 23.

and the fact that they are not admissions against interest.²⁴¹ It is necessary to note, however, that *Ciancio*, while definitely a Mr. Big case, did not specifically deal with the law of hearsay and admissions.

It is submitted that it is indeed a peculiarity in Canadian law, and particularly in the law of British Columbia, that judges will hold that Mr. Big statements are absolutely admissible in murder trials as admissions, without recourse to the principled approach; while at the same time stating that they are manifestly unreliable and that they are not “against interest”. It is also interesting that some judges conduct threshold reliability analyses anyway in case they are found to be in error. Judges at the trial level appear to be pulled in two ways. On one hand the doctrine of *stare decisis* points in the direction of admissibility without any test whatsoever. However, the recognition of the manifest unreliability of the statements seems to mandate a threshold reliability analysis in any event. One can hardly fault the trial judge for exercising an abundance of caution.

The British Columbia Court of Appeal addressed the hearsay/admissions issue in *R. v. Terrico*²⁴² in 2005. At first glance the judgment would seem to settle the question of whether or not admissions should be treated as other hearsay exceptions and subjected to the principled approach. The majority judgment, delivered by Huddart J.A., Lowry J.A. concurring, states that admissions should be allowed into evidence without a reliability analysis. However, it is respectfully submitted in this thesis that just as the British Columbia Court of Appeal erred in *Earhart* in its reading of *Bonisteel* from the British Columbia Court of Appeal and of *Osmar* from the Ontario Court of Appeal, so too in

²⁴¹ *R. v. Ciancio* 2006 BCSC 1673 at paras. 267 to 268 [*Ciancio*].

²⁴² *Terrico*, *supra* note 11.

Terrico did the majority err with regard to its reading of some Supreme Court of Canada cases.

Newbury J.A.'s opinion, which concurred in the result with that of the majority also invites some examination. Like other judges she raises the question of whether or not admissions should be subjected to the principled approach. In her minority opinion Newbury J.A. points out the particular circumstance in the case at bar that at the voir dire stage of the trial defence counsel had argued, and the prosecution had conceded, that a *Starr* analysis of the Mr. Big statement should be undertaken.²⁴³ After himself commenting on whether or not admissions should be treated like other hearsay, the Trial Judge concluded that the target's statements did pass the test of threshold reliability. He cited the many other cases in which Mr. Big statements were admitted and he adverted to the undercover officers' admonitions to be truthful.²⁴⁴

Newbury J.A. noted that although the trial prosecutor had conceded to the defence's request for a *Starr* analysis, the appeal prosecutor did not. In addressing the question of whether or not admissions should be treated the same as other hearsay exceptions Newbury J.A. cited some passages from *Starr* on the difficulty of defining hearsay and then stated as follows:

[21] There is no doubt that the question is a longstanding one among learned authors: see, e.g., *Wigmore on Evidence* (Chadbourn rev. 1972), v. 4, at §1048-49; J.W. Strong, *McCormick on Evidence* (5th ed., 1999) v. 2, at §254; J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (2nd ed., 1999), at §6.292; E.H. Morgan, *Basic Problems of Evidence* (Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, 1962), at 265-66; M.N. Howard, *Phipson on*

²⁴³ *Ibid.* at para. 14.

²⁴⁴ *Ibid.* at para. 16.

Evidence (15th ed., 2000), at 28-03; and that it is one about which different courts have made different assumptions at different times. As Ms. Duncan points out, the Supreme Court of Canada in cases such as *R. v. Fliss*, *supra*, and *R. v. Grandinetti*, *supra*, considered the admissibility of the statements in question made by the accused, without any reference to *Starr* or the threshold analysis it mandates; while in *R. v. Evans*, [1993] 3 S.C.R. 653, Sopinka J. for the Court observed that it is "open to dispute whether the evidence is hearsay at all." (At 664.) On the other hand, in *R. v. Foreman*, (2002) 169 C.C.C. (3d) 489, the Ontario Court of Appeal recently said that such statements "are admitted without any necessity/reliability analysis" and distinguished *Starr* on this basis. (Para. 37.) None of the courts or academic writers, moreover, has addressed the question of an accused's right to silence in this context: can it truly be said he or she is 'available for cross-examination'?

[22] These issues are ones on which the guidance of the highest court in Canada would be useful — particularly in the context of an accused's right to remain silent — but I do not propose to try to resolve them here. Since the Crown at trial took the view that the hearsay rule was engaged and therefore *Starr* was applicable, and the trial judge acceded to that approach, I propose to make a similar assumption and turn to the question of whether the trial judge's ruling has been shown to be erroneous.²⁴⁵

It is submitted in this thesis that Newbury J.A.'s statement affirming the continued uncertainty in this area of law is correct. Admissions against interest in general do indeed inhabit a twilight section of the landscape of evidence law. This being the case, she elected to err on the side of caution and review the Trial Judge's finding on the threshold reliability issue:

[25] Accordingly, although the appellant's admissions were *prima facie* hearsay and "presumptively inadmissible" as such, it would appear from the second sentence of para. a. that they were instead presumptively admissible as coming within the traditional exception for admissions against interest. The appellant argues, however, that he did have a clear motive to lie, being afraid he would be treated violently by the "biker gang" if he was seen as a "rat" or otherwise displeased them, and that his statements were therefore unreliable. (The requirement of necessity was not dealt with specifically by the trial judge in his Reasons and was not argued before us on appeal.) Mr. Arbogast submitted

²⁴⁵ *Ibid.* at paras. 20-22.

that the undercover officers' efforts to impress the appellant as violent criminals may be taken to have created sufficient fear in his mind as to overcome the usual presumption that people do not normally lie about having committed murders. As has been seen, Mr. Terrico attested later in the trial proper as to his fear, as did the female undercover officer who observed him during the staged beating of "John". The defence submits that these amounted to indirect threats against the appellant which in their effect were little different from direct threats of violence. Accused persons are of course protected by the rules regarding voluntariness from having inculpatory statements made in the latter circumstance admitted into evidence against them.

[26] But the fear which had been instilled in the accused by the "biker gang" was seen by the trial judge as operating in a different way: instead of being motivated to lie about his past deeds, Mr. Terrico was told repeatedly that it was necessary for him to be absolutely truthful in his statements to the undercover officers, and that they had access to police records and the ability to check on whatever he told them. Consistent with this, the appellant told "Tom" that he had lied to him regarding how much time he had served for armed robbery, but that now he was coming clean and was being a "straight shooter". In his conversation with Sergeant "B", the appellant said he had planned the murder and had agreed to pay Mr. B.B. \$25,000 for doing it, but he (the appellant) had not been present at the scene or hit his father in the head — a change from what he had told "Tom" previously. In all these circumstances, and bearing in mind that the question is one of threshold admissibility, I cannot say that the trial judge erred in concluding that that level of reliability was met. The appellant was given every reason to believe that any untruth of which he might boast in his eagerness to join the "bikers", or in which he might be tempted to take refuge because of fear, would be quickly found out and that he would be punished. Bearing in mind that the question was one only of threshold reliability, I cannot say that the trial judge erred in these circumstances in finding that the requisite level of reliability was met.²⁴⁶

The import of the presence of fear, intimidation and other significant emotional variables inherent in the elicitation of a Mr. Big statement is undeniably quite relevant in an examination of this evidence in the context of hearsay. Some judges obviously argue that the evidence should be admitted without a necessity/reliability analysis by operation of the law as stated by Sopinka J. in *Evans*. However, it is submitted in this thesis that such an approach, arguably mechanistic and definitely automatic, runs counter to the

²⁴⁶ *Ibid.* at paras. 25-26.

spirit of the law as expressed in *Starr*. It seems fair to state that there is an unanswerable psychological question in play in many of the Mr. Big judgments. Is the atmosphere of greed or fear or desire created by the sting likely to induce deception or honesty? Are the targets, in the face of a rising tide of manipulation, more likely to tell the truth or to tell lies when it comes to statements about their guilt or innocence? It is clearly impossible to say. The defence typically says the target was scared or greedy or otherwise influenced so he must have been lying. The prosecution says those same visceral forces can only have resulted in the targets telling the truth. In an abstract sense, it is submitted that this is a debate that neither side can win; however, in a practical sense the prosecution's argument is prevailing.

In this regard it can be noted that in *Starr*, Iacobucci J. stated that "lower courts have recognized the absence of a motive to lie is a relevant factor in admitting evidence under the principled approach...[c]onversely, the presence of a motive to lie may be grounds for exclusion of evidence under the principled approach".²⁴⁷ It is worth pointing out that Iacobucci J. does not favour indicia of truthfulness over indicia of lying or vice versa.

Judges and scholars, in their efforts to define hearsay, have necessarily identified many 'hearsay dangers'. In looking at Mr. Big sting statements in the light of *Starr*, it should be further emphasized that the question of whether the statement admitting guilt for murder is a verity or is a lie is the only issue. There are no other hearsay dangers. There is no danger of the original declarant being factually, albeit unintentionally incorrect. E.g. did he really see what he claimed to see? Was it really the accused's car

²⁴⁷ *Starr*, *supra* note 212 at para. 216.

parked outside the victim's house on the night of the murder? Might he have been mistaken? Was it dark? Was he wearing his glasses? No, the declarant in a Mr. Big sting knows absolutely whether or not he killed the victim.

Nor is there any question of whether the declarant took what he was saying seriously when he spoke. E.g. was he engaging in idle gossip at a party? Was he speaking facetiously? Was he playing a game of truth or dare? No, the declarant in a Mr. Big sting is making a serious statement to one he believes to be a ruthless crime boss. He has been encouraged by the primary officer to be truthful and "straight". He is trying to appear in deadly earnest. The only question is whether he is lying or telling the truth.

Looking at the statement in isolation it is patently impossible to determine, logically or empirically, whether the target was so scared or greedy or eager to please that he told the truth, or whether he was so scared or greedy or eager to please that he told a lie. In such a situation the only rational outcome may arguably be to exclude the evidence. But since a blanket exclusion of a recognized hearsay exception like an admission is unlikely, a reasonable compromise would be, it is submitted, to subject the Mr. Big admission to a *Starr* analysis, or better yet a rigorous inquiry into its voluntariness pursuant to the confessions rule.²⁴⁸

²⁴⁸ Empirically, of course some target statements can be compared to objectively known facts such as how the victim was murdered, when the victim was murdered, where the body was found, et cetera. Ususally, however, all of those circumstances are already previously known to the police and the target so the point becomes moot. I.e., Wytshyn knew the landlady had been strangled; Terrico knew his father had been shot and bludgeoned; Hart, whose case will be discussed later, knew his daughters had died by drowning. On the other hand, Lowe led his undercover team to the general vicinity of where the victim's body had been found, although at trial he partially denied the police's side of the story and made explanations about rumours he had heard in the community about the victim's demise and where his body had been dumped.

When faced with the question of whether threshold reliability had been met, Newbury J.A. was not able to find error with the Trial Judge's reasoning and so she upheld the admissibility of the evidence. Huddart J.A. for the majority, however, would not have bothered with a *Starr* analysis at all. She disagreed with the notion that admissions should be subjected to the principled approach, citing the previously reproduced definition of the admission by Sopinka J. in *Evans*. Of that definition she then stated:

[47] Nothing the Supreme Court of Canada has said since has changed that fundamental rule.

[48] *Starr* was not about an accused's admission against interest. Its focus was police evidence of a civilian witness's prior identification of the accused and a statement of intention by a non-party, one of the murder victims. The majority determined the deceased declarant's statement did not meet the reliability threshold required by the principled approach to hearsay developed in *R. v. Khan*, [1990] 2 S.C.R. 531 and *R. v. Smith*, [1992] 2 S.C.R. 915. The deceased's statement to his girlfriend about going with the accused to carry out an insurance scam did not meet the threshold, as it was made in circumstances of suspicion. He could have been telling his girlfriend about the insurance scam to conceal his true purpose of spending time with another woman. Neither Iacobucci J., writing for the majority, nor McLachlin C.J. and L'Heureux-Dubé J., writing in dissent, suggested the principled approach to the admission of hearsay should be extended to statements of accused persons. If the Supreme Court intended that result, I would have expected a lively discussion of the issue. In neither *R. v. Fliss*, 2002 SCC 16 nor *R. v. Grandinetti*, 2005 SCC 5, did the court suggest a *Starr* analysis was required. In both cases, the court was examining the admissibility of an accused's statements to undercover police officers.

[49] I agree with Doherty J.A. when he wrote in *R. v. Foreman*, (2002), 169 C.C.C. (3d) 489 (Ont. C.A.), leave to appeal refused, [2003] S.C.C.A. No. 199 (Q.L.) that the hearsay rule poses no obstruction to the admissibility of a statement made by a litigant and tendered as evidence at trial by the opposing party. Such a statement is admitted without any necessity/reliability analysis as an admission against interest.

[50] The application of this rule does not lead to injustice in this case. The appellant's statements are a confession to murder. The concerns about an

absence of meaningful opportunity to cross-examine the appellant in court under oath or solemn affirmation as to the truth of its contents do not arise. The consequences to the accused do not differ from those that flow from admitting evidence from a third party witness about an accused's voluntary statement to a person in authority. Defence counsel can cross-examine the witness as to what the accused said. If that is not sufficient, the accused can testify and call the witness's version of the statement into question. An accused is never available as a witness. He cannot be compelled to testify.

[51] It follows the only analysis required of the trial judge was to weigh the probative value of the evidence against its prejudicial effect. The trial judge saw no basis for excluding the appellant's statements. I agree there was no barrier to their admission.²⁴⁹

It is submitted that Huddart J.A. makes some errors here that reduce the persuasiveness of her judgment. In the first place, her statement that nothing the Supreme Court of Canada has done since *Evans* has changed the law of admissions does not take into account all of the debate and controversy that has occurred as a result of the Supreme Court's judgment in *Starr*. The very question at issue is whether or not *Starr* should apply to admissions.

That said, the question raised by *Starr* is clearly uppermost in her mind. Unfortunately, she makes a fundamental error in logic when she states that because *Starr* was not about an accused's admissions against interest Iacobucci's reasons should therefore have no bearing upon them. In fact Iacobucci's reasons in *Starr* concerning application of the principled approach to established hearsay exceptions can only be taken to be inclusive of all hearsay exceptions. Iacobucci J. did not differentiate. It is submitted that it would be unreasonable to have expected the Supreme Court of Canada to have made a statement like 'and this new rule shall also include admissions'. To expect courts to itemize to such an extent would grind our legal system to a halt.

²⁴⁹ *Ibid.* at paras. 47 to 51.

Following Huddart J.A.'s logic, it would be arguable that the principled approach should only extend to those forms of hearsay that were specifically under review as disclosed by the facts in *Starr*. Clearly that result would be perverse. To cherry-pick admissions for exclusion from the principled approach as has been done in the cited passage seems unfair.

A further logical error occurs when Huddart J.A. invokes *Fliss* and *Grandinetti* as authority for the proposition that no *Starr* analysis of target statements is required in Mr. Big cases. Simply put, neither of these cases, although they were Mr. Big cases, dealt with admissions of a party as hearsay. *Fliss* dealt mainly with the use an undercover officer could make on the stand with regard to transcripts of recordings and notes he had taken. The judgment in *Grandinetti* contained only one passing reference to hearsay as it related to voir dire statements made by the accused's relative.²⁵⁰

Furthermore, it is, of course, a well-known feature of the Canadian criminal legal system, that judges as a rule do not address in their written decisions those issues that are not raised by parties. Again, if this were not the case the legal system would grind to a halt. Indeed, appellate panels will generally refuse to address issues that were not raised by counsel at trial, or worse, were not pleaded in notices of appeal or other documents. Consent by appeals courts to consider or address issues not properly raised by parties or their counsel is very much the exception not the rule. Of course, obvious dereliction of duty or blindness to legally relevant issues are occasionally remedied by judges on their own motions. However, for the most part they focus only on those issues properly raised in a timely manner by parties and counsel.

²⁵⁰ *Grandinetti*, *supra* note 2 at para. 18.

This being the case, it is submitted that it seems somewhat specious for Huddart J.A. to rely on *Fliss* and *Grandinetti*, cases that have nothing to do with admissions by a party as hearsay, to support her proposition that Mr. Big target statements should not be subject to the principled approach to hearsay as a traditional exception because of their special status as described in *Evans*.

It is submitted that in relation to the two above criticisms, the majority of the British Columbia Court of Appeal has fallen into the logical error of mistaking absence of evidence for evidence of absence. It is not intended in this thesis to single out for criticism, or to make an unduly harsh assessment of, the British Columbia Court of Appeal. Indeed, as has been illustrated thus far, and as will be illustrated further, this judicial habit of taking the most meagre view possible of the justice of excluding Mr. Big target statements is the norm throughout all levels of courts and across all jurisdictions in Canada. It is only because so many of these cases are within British Columbia's jurisdiction that British Columbia judgments tend to be the most scrutinized.

Indeed, in the Ontario Court of Appeal the defence argument for application of the principled approach also failed. In *R. v. Osmar*, Rosenberg J.A. for the court stated:

[52] The other submission for exclusion of the statements based on the common law rests on a hearsay analysis. The appellant submits that in light of *R. v. Starr* (2000), 147 C.C.C. (3d) 449 (S.C.C.), it is open to this court to revisit the established hearsay exceptions, including the admissions exception, on the basis of whether the particular evidence meets the requirements of necessity and reliability. The appellant argues that the admissions exception to the hearsay rule rests on the theory that admissions against interest are inherently reliable. He points out that in the Mr. Big scenario the statements are not against interest since the suspect believes that it is in his interest to admit to a crime to fellow criminals.

[53] In my view, the hearsay issue has been determined against the appellant by this court's decision in *R. v. Foreman* (2002), 169 C.C.C. (3d) 489. As

Doherty J.A. pointed out in *Foreman* at para. 37, by reference to *R. v. Evans* (1993), 85 C.C.C. (3d) 97 (S.C.C.), the rationale for admitting admissions by a party rests on the theory of the adversary system, not a necessity/reliability analysis. As in this case, the accused's admission in *Foreman* was not made to someone whom the accused believed was a person in authority. In *Foreman*, the admissions were made to the victim. The admissions were admissible even though they had not been subjected to a reliability analysis such as would be required if the statements had been made to persons in authority and therefore had to be shown to be voluntary.²⁵¹

The hearsay/admissions issue was much less to the fore in this case, which was much more focused on abuse of process, constitutional issues, and expert evidence. However, the result was the same as in *Terrico* in that the Ontario Court of Appeal found, based on the ruling in *Foreman*, that Sopinka J.'s definition of admissions in *Evans* meant that admissions were exempt from the principled approach or *Starr* analysis.

Once again, it is submitted that some reasoning underlying this exemption is necessary. Undeniably, the analysis in *Starr* spoke to all hearsay exceptions equally without singling any of them out for special treatment. Why a previous judgment, i.e. *Evans*, should unfailingly stand up against this is not explained. It is submitted that a definitive statement from the Supreme Court of Canada is by this point not only desirable but absolutely necessary.

A final jurisdiction to be examined is Newfoundland and Labrador. In this province it would appear that the question of whether or not admissions of a party are subject to the principled approach is still open. In addressing the hearsay issue in *R. v. Hart*, W.G. Dymond J. considered the judgment of the Supreme Court of Canada in *R. v. Mapara* and opined that in that case:

²⁵¹ *Osmar (C.A.)*, *supra* note 8 at paras. 52 to 53.

The result is that McLachlin, C.J., for the majority, seemed to confirm what Sopinka, J. stated in **Evans** (supra) about oral statements and their admission as a party. This, however, can only be inferred because in the case of **Mapara** the Supreme Court of Canada is clearly dealing with the hearsay exception of the co-conspiracy rule. At paragraph 27 the court states:

“In sum, the conditions of the Carter rule provide sufficient circumstantial guarantees of trustworthiness necessary to permit the evidence to be received.”²⁵²

It is submitted in this thesis that W. G. Dymond J. is correct and that any effort to conflate the co-conspirators’ exception rule with the admissions rule can be based only on inference. Furthermore, W.G. Dymond J. also cites the dissent in *Mapara*:

[100] LeBel and Fish, JJ. disagreed with the majority and concluded that the principled approach should be used even in hearsay evidence. LeBel, J. quotes Lamer, C.J. in **R. v. U (F.J.)**, [1995] 3 S.C.R. 764 at paragraph 45 of the **Mapara** case as follows:

“[a]s the goal of our modifications of the principles governing hearsay has been to end the rigid artifice of pigeon-hole exceptions, it is important that new criteria remain flexible.”

LeBel, J. continues:

“Reliability and necessity have thus become the predominant criteria governing the admissibility of hearsay evidence.”²⁵³

W. G. Dymond J. also comments on the law in other jurisdictions, for example Manitoba and Alberta, where Mr. Big statements would appear to be considered the same as other hearsay exceptions and subject to the principled approach.²⁵⁴

The general importance of *Khelawon* in the development of hearsay law is also considered, although W.G. Dymond J. points out that:

²⁵² *Hart (voir dire)*, supra note 127 at para. 97.

²⁵³ *Ibid.* at para. 100.

²⁵⁴ *Ibid.* at paras. 101 to 104.

[113] It is important to note that in **Khelawon** the court is again dealing with hearsay evidence and does not say much about admissions against interest in a criminal trial. The reliability issue has not been addressed directly when the admissions are allegedly the result of psychological threats, intimidation and inducements by persons not in authority, resulting in admissions of guilt in a pre-detention setting.

.....

[118] The Supreme Court of Canada has thus made a change in the direction as it relates to evidence admitted as exceptions to the hearsay rule. It does not do much to clarify the position as to statements or admissions which may or may not have the protection of threshold reliability.²⁵⁵

In addition to commenting on the British Columbia Court of Appeal's decision in *Terrico*,²⁵⁶ W.G. Dymond J. also recognizes the ambiguous nature of the admissions as being arguably both in the target's interest and against the target's interest.²⁵⁷ Like other judges, he also expresses a desire for the issues he has raised to be fully addressed by the Supreme Court of Canada.²⁵⁸ Having considered the legal arguments presented, he concludes that

[128] As for a resolution of the issue at this stage, I have no clear guidance, except in light of the **Khelawon** (supra) decision, which now allows the court to look outside the taking of the statement. In this case the *voir dire* is completed and I intend to direct the decision as closely as possible to the **Starr** criteria. If it becomes necessary to reargue **Khelawon** at a later time, so be it.²⁵⁹

Having determined that it was at least provisionally necessary to conduct a threshold reliability inquiry, the Trial Judge ruled as follows:

²⁵⁵ *Ibid.* at paras. 113 and 118.

²⁵⁶ *Ibid.* at paras. 121 to 125.

²⁵⁷ *Ibid.* at para. 127.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.* at para. 129.

[136] The Crown's position on threshold reliability is that the Accused could not lie to the "boss" because the "boss" had means of finding out. The Crown states the big "boss" scenario meets the threshold reliability test because the Accused had made an admission to "G", which Mr. Hart denies or says he could not remember on the *voir dire*. Mr. Hart was aware that the big "boss" stated to Mr. Hart that he had to come down hard on "G" because he had not told the "boss" about what Mr. Hart had told "G". Mr. Hart, however, has denied making that statement to "G" on the *voir dire*. Yet when Mr. Hart meets the crime "boss", Mr. Hart knows that the crime "boss" was on "G's" case because he had forgotten to tell the crime "boss" about what Mr. Hart told "G" about the death of the children. The Crown takes the position that Mr. Hart did not have to tell anyone on April 10th about the children being drowned, because he was continually told he did not have to try and impress "G". The Crown argues the fact that this statement was given to "G" without pressure, unprompted and took place one month before the crime boss scenario, is evidence of reliability of the crime "boss" admission. This statement to "G" is now being denied by Mr. Hart on the *voir dire*, saying he never told "G". However, the issue of whether his admission to "G" in April was or was not made is clearly a trial issue.

[137] Yet, the video-taped statement to the crime "boss" is about the "boss" wanting to know about Mr. Hart's daughters' death.

[138] If Mr. Hart is now saying that these admissions to the crime "boss" were lies and he only made these admissions because of fear, intimidation, psychological stress and fear for his life, the question is whether he would risk lying about the drownings to someone who is saying I want to help you with this issue and make it go away. Would Mr. Hart risk being caught in his own lie to the "boss" in an attempt to gain the confidence of the organization, after being warned of what the consequences of lying would be by "G" shortly before the interview?

[139] The Defence argues that the statements to the crime "boss" and the narrative leading up to it are so fraught with untrustworthiness that they should not be admitted. The motive to lie was real. I have already reviewed earlier the Defence's position as to the trustworthiness on a review of the s. 7 *Charter* arguments that were presented in the earlier part of the decision dealing with threats, psychological threats, intimidation and fear and whether this constitutes a s. 7 *Charter* breach as a principle of fundamental justice.

[140] When the court examines the oral admissions to the crime "boss" and the alleged admissions to "G" and "I" as to whether these latter statements were actually made, it is difficult to assess one without referring to the other. It was also stated earlier that Mr. Hart had given exculpatory statements to the police earlier in the investigation. On the *voir dire* it is not the trial judge's job to assess the credibility of Mr. Hart or to determine the truthfulness of the statements or whether they were actually made. All that is required on the threshold reliability

test is to look at the trustworthiness issue and the circumstances surrounding the taking of the statement. It is true that Mr. Hart wanted into the organization and he did have a motive to lie, but there was reason for him to come clean with the “boss”, especially when coming clean meant any potential problem Mr. Hart may have had could be eliminated by the very person he was telling the problem to. It is interesting to note that Mr. Hart actually went to a WalMart store and stood in front of a video camera to have his photo taken at a designated time. This designated time was supposed to be the time when a particular individual who witnessed the drowning was supposed to have been taken care of by one of the crime gang members.

[141] The purpose of the picture was to provide an alibi for Mr. Hart as it related to taking care of the individual that supposedly had seen Mr. Hart commit the crime.

[142] The video-taped admission to the crime “boss” based on the surrounding circumstances of the narrative and the circumstances surrounding its taking, I conclude, would pass the threshold test of reliability. It should be admitted as part of the evidence in front of the jury.²⁶⁰

Once again the determination of threshold reliability necessarily focuses on whether or not the statements are the truth or are lies. Also once again the statements are found to meet the principled approach test of threshold reliability.

Hart was convicted of murder. His appeal is ongoing, but, as previously noted, has been plagued by procedural troubles. Apparently something of a simpleton at the best of times, he has become convinced that the entire legal system; including the Newfoundland and Labrador Courts, the Crown prosecutors, Newfoundland and Labrador Legal Aid, and of course the police; are still engaged in an undercover sting designed to perpetuate his imprisonment. He apparently finds the entire process to be unreliable.²⁶¹

²⁶⁰ *Ibid.* at paras. 136 to 142.

²⁶¹ *R. v. Hart* 2009 NLCA 10, 242 CCC (3d) 31 at para. 19 [*Hart (C.A.)*]. Hart’s problems are discussed in many other Supreme Court of Newfoundland and Labrador Appeal Division judgments as well.

In concluding this examination of the law of hearsay and admissions in Mr. Big cases, it is submitted that in any event the admission of targets' statements seems to be a foregone conclusion. Whether admissions as hearsay are ultimately ruled to be subject to a threshold reliability analysis or not, the point is arguably moot since judges in all jurisdictions never fail to find that the threshold reliability standard is met.

In the final analysis, it is submitted that what is much more important, from both a practical and a more philosophical view, is why the statements are found to meet the threshold reliability standard. Many judges have found that as a general rule Mr. Big target statements are manifestly or inherently unreliable. Many judges have pointed out the incentive to lie as well as the incentive to tell the truth. Indeed, the only hearsay danger is whether or not the statement is a lie. Furthermore, in many if not most cases involving a jury, the judge will warn the jury that the statement could be false or unreliable.

Will an emotional cocktail of greed, fear and the promise of social acceptance make a person falsely confess to murder or will it make him tell the truth? Do threats from a crime boss promote truth-telling or story-telling? What if those threats are only implicit, always under the surface, and are interspersed with guarantees that the target can 'walk away at any time'? Arguably, the Mr. Big interview scenario starts to look less and less like a hearsay scenario, and more and more to look like a carnival funhouse mirror image of an aggressive and formal police interrogation, with the law enforcement authority figure interspersing demands for the truth with repetitions of a formal right to refuse to answer questions. Clearly, reliability is a concept that is far from being clearly

defined in Mr. Big cases. Perhaps the answer, as previously proposed in this thesis, is to submit the evidence to a formal voluntariness inquiry.

**CHAPTER SEVEN – VOLUNTARINESS, INCLUDING RELIABILITY,
PERSON-IN-AUTHORITY AND THE HODGSON WARNING**

Although the topic of voluntariness and reliability was sequentially the first to be discussed in the second chapter of this thesis, “Some Introductory Matters and Observations Arising from a Legal Analysis of the Sting”; it has been left for further discussion in this, the last chapter of the thesis. The main reason for this structural choice is the submission that it is the application of the voluntariness test that presents the most obvious and workable solution to the problem of possible wrongful convictions as a result of the sting.

As has been mentioned previously, it is a fact that this area of law is the most clearly decided one in the Mr. Big jurisprudence. The Supreme Court of Canada’s unanimous decision in the case of *R. v. Grandinetti*²⁶² stands as unassailable authority for the admissibility of Mr. Big statements without any recourse to the common law confessions rule. This being the case, it is not surprising that there is relatively little mention made in *Grandinetti* or in other Mr. Big cases regarding the actual voluntariness test itself as described in *R. v. Oickle*.²⁶³

Grandinetti settled decisively the legal proposition that undercover officers in a Mr. Big sting cannot be considered persons in authority, and that there is therefore no triggering of the voluntariness test. The judgment to which the Court referred to most in coming to this decision was the previous Supreme Court of Canada decision, *R. v.*

²⁶² *Grandinetti*, *supra* note 2.

²⁶³ *Oickle*, *supra* note 57.

Hodgson.²⁶⁴ However, the Supreme Court did not, in *Grandinetti*, advert to or discuss the *Hodgson* warning.

It is also worthwhile within the scope of this thesis to point out that *Grandinetti* was an appeal as of right from the Alberta Court of Appeal's decision in the same matter.²⁶⁵ That being the case, this chapter will also examine the dissenting judgment of Madam Justice McFadyen from that Court.

Cases decided prior to the Supreme Court's decision in *Grandinetti* are also uniform in their decisions to admit the statements of Mr. Big targets without recourse to a consideration of voluntariness. Many of the judgments also consider reliability in general, as well as the applicability of the *Hodgson* warning. As is the case with examinations of case law from other chapters in this thesis, most but not all of the judgments originate in the courts of British Columbia.

One of the major factors influencing possible views of the legal rules surrounding voluntariness in an examination of the Mr. Big sting is the question of whether or not the undercover operators present themselves as having such great power as to be able to influence the course of the actual murder investigation through corrupt influence. This facet was addressed as one of the scenarios in the first chapter of this thesis. With regard to this state of affairs, defence counsel has argued that when undercover police officers claim to the target that they can influence a prosecution or a police investigation through corrupt contacts, that essentially puts the sting operators in the position of a person in authority. The Supreme Court summed this up fairly succinctly in *Grandinetti*:

²⁶⁴ *Hodgson*, *supra* note 60.

²⁶⁵ *R. v. Grandinetti* 2003 ABCA 307, 178 C.C.C. (3d) 449 [*Grandinetti C.A.*]

13 The defence position at trial was that the undercover officers were “persons in authority” because Mr. Grandinetti believed they could influence the investigation into the murder of his aunt through the corrupt police officers they claimed to know. This, the defence argued, shifted the burden to the Crown to prove either that Mr. Grandinetti did not reasonably believe the undercover officers were persons in authority, or that the statements were made voluntarily. The Crown, on the other hand, argued that the undercover officers could not be persons in authority because the accused must believe that the recipient of a confession can influence the investigation or prosecution by aiding, not thwarting, the state’s interests.

14 The trial judge held a *voir dire* to determine the threshold issue, namely whether Mr. Grandinetti had met his evidentiary burden of showing that there was a valid issue about whether the undercover officers were or could be persons in authority. For this purpose, the defence called three witnesses: Corporal Rennick, Constable Johnston, and Mr. Grandinetti.

15 The trial judge ruled that the undercover officers could not be persons in authority, that no *voir dire* on voluntariness was necessary, and that the statements were admissible. She found that Mr. Grandinetti was totally unaware of the true identity of the undercover officers, and, in fact, had a collegial relationship with them. She emphasized that the “person in authority” test is largely a subjective one, based on the reasonable beliefs of the accused. She concluded that logic and reason required that the definition of “person in authority” be limited to people the accused believes are acting in collaboration with the authorities. In her view, the undercover officers could not be considered persons in authority because Mr. Grandinetti viewed them not as acting for or in collaboration with the interests of the state, but rather against those interests.²⁶⁶

This was not the first time that the argument for a modification of the person-in-authority rule had been made. From the beginning of Mr. Big’s tenure in the arsenal of Canadian law enforcement, this area has been an issue. For example, in a very early case, *R. v. McCreery*,²⁶⁷ defence counsel argued on a *voir dire* that the person-in-authority

²⁶⁶ *Grandinetti*, *supra* note 2 at paras. 13 to 15.

²⁶⁷ *McCreery*, *supra* note 129. [1999] 8 W.W.R. 699, 16 C.R. (5th) 71 (B.C.C.A.) [*McCreery C.A.*]

requirement ought to be expanded. The unconstitutionality of the requirement under ss. 7 and 11(d) of the *Charter* was also raised and addressed:

[46] Defence counsel submit that a "person in authority" should be expanded to include undercover officers, like Constable Doran or Corporal Stenhouse, who induce or coerce a confession from the accused. In addressing this issue, I have instructed myself on the law as enunciated in *R. v. B.(A.)*, (1986), 26 C.C.C. (3d) 17 (Ont. C.A.), leave to appeal to the Supreme Court of Canada refused, (1986), 26 C.C.C. (3d) 17n (S.C.C.) at p. 29, Cory J.A. (as he then was) stated that the question of whether or not a person is a person in authority is a question of fact. At p. 27, in his summary of the principles derived from the authorities on this issue, he stated in part:

(5) The question as to whether the statement was made to a person in authority will be viewed subjectively, that is to say, from the point of view of the accused person who made the statement. The proper test is that given in Kaufman, *Admissibility of Confessions in Criminal Matters*, 3rd ed. (1979), p. 81, to the effect that did the accused truly believe, at the time he made the declaration, that the person he dealt with had some degree of power over him?: see *Rothman v. The Queen*, *supra*, at p. 36.

[47] In the case at bar, I can find no evidence that at the time the accused made the statements to Constable Doran or Corporal Stenhouse, he felt either of them had any degree of power over him. Apart from this, I also see no justification whatever for expanding the rules enunciated in *R. v. B.(A.)*, *supra*.

[48] In rejecting this argument of counsel for the accused, I also follow the rulings of my learned brothers in *R. v. Eggleston* (January 19, 1996) unreported, Dawson Creek Registry No. 5394, (B.C.S.C.) per Wilson J. and *R. v. Copeland and Forknall* (April 30, 1996), Prince George Registry No. 17165, (B.C.S.C.) per Singh J. In rejecting the argument of Counsel for the accused with respect to the unconstitutionality of the common law rule relating to confessions and their submission that the person in authority requirement should be abolished, as contrary to s. 7 and s. 11(d) of the *Canadian Charter of Rights and Freedoms*, I also follow the decisions of my learned brothers in *Eggleston and Copeland*, *supra*.²⁶⁸

²⁶⁸ *Ibid.* paras. 46 to 48.

In this early sting, which appears somewhat rudimentary yet nonetheless effective in its design, there appeared to be no attempt made to convince the target that the undercover officers had connections with the police or prosecution through which they could influence the target's circumstances. It is also apparent that the Trial Judge found that it was important to look into whether or not the declarant truly believed that the undercover officer had power over him, and that that inquiry had to be looked at subjectively, from the point of view of the declarant. As is apparent from the above extract, this principle was identified in a quotation from Cory J.A. (as he then was) who went on to be the Supreme Court of Canada judge who wrote the decision in *Hodgson*.

In *McCreery* the officers did not pretend to have corrupt influence with the police. This was not the case in *R. v. Redd*, in which the Voir Dire Judge noted that:

the defence says that the admissions should be excluded because the undercover police officers held themselves to be persons who could influence members of the justice community, police officers, Crown counsel and even members of the judiciary, and so became persons in authority. Therefore, the defence argues, the admissions made without police or *Charter* warnings are inadmissible.²⁶⁹

In response to this argument, the Voir Dire Judge noted the general admissibility of statements made to undercover agents:

Many challenges to this type of evidence have focused on the argument, now rejected, that the undercover operators were persons in authority and that statements made to them in the absence of standard warnings were therefore inadmissible. In *R. v. Eggleston*, [1997] B.C.J. No. 2948 (C.A.) Mr. Justice Hall, referring to *R. v. McIntyre*, *supra*, *R. v. Moore* (1997), 94 B.C.A.C. 281 and *R. v. French* (1997), 98 B.C.A.C. 265, held that the body of authority was "conclusive against that position".²⁷⁰

²⁶⁹ *Redd*, *supra* note 133 at para. 156.

²⁷⁰ *Ibid.* at para. 165.

As far as the added factor of having undercover police claiming to the target that they are able to influence the outcome of a police investigation due to corrupt influence with law enforcement is concerned, the Voir Dire Judge stated as follows:

[178] Defence counsel submitted that this undercover operation was unlike others described in the cases dealing with "person in authority" because the police officers held themselves out as having a corrupt influence with all levels of the criminal justice system. They say that having indicated their power reached to police, prosecutors and judges, they operators clothed themselves in the trappings of authority. They say the police officers went too far, and the evidence should be rejected.

[179] In *R. v. Hodgson*, [1998] 2 S.C.R. 449, 127 C.C.C. (3d) 449 (S.C.C.) at p.467 (C.C.C.) Mr. Justice Cory discussed the limits of the person in authority requirement and said at p. 468:

Since the person in authority requirement is aimed at controlling coercive state conduct, the test for a person in authority should not include those whom the accused unreasonably believes to be acting on behalf of the state.

[emphasis added]

[180] In this case any belief Mr. Redd had that "Tim" and "Al" were acting against the state, and any belief he had that these persons had influence with elements of the criminal justice system was a belief that they could thwart legitimate state authority, or engage in anti-state activity. This does not meet the test described in *R. v. Hodgson, supra*.²⁷¹

Vincent Redd was eventually convicted and his conviction was upheld by the British Columbia Court of Appeal.²⁷² *R. v. Redd* attracts some notice as a possible wrongful conviction because of the many lies he told to Mr. Big operatives throughout the sting. This issue will be addressed later in this thesis.

²⁷¹ *Ibid.* at paras. 178 to 180.

²⁷² *R. v. Redd* 2002 BCCA 325 [*Redd C.A.*]

In terms of the question of what constitutes a person in authority, it is to be noted that the trial judge in the *Redd* voir dire gives special significance to the fact that the undercover operators were specifically pretending to be “acting against the state....could thwart legitimate state authority, or engage in anti-state activity”. The significance of the pretended “anti-state” design is not readily apparent in *Hodgson*. In fact, it is probably a good idea to examine the larger passage in *Hodgson* from which the extract cited above in *Redd* originates:

33 The subjective approach to the person in authority requirement has been adopted in this Court. See *Rothman, supra*, at p. 663. The approach adopted by McIntyre J.A. (as he then was) in *R. v. Berger* (1975), 27 C.C.C. (2d) 357 (B.C.C.A.), at pp. 385-86 is, in my view, a clear statement of the law:

The law is settled that a person in authority is a person concerned with the prosecution who, in the opinion of the accused, can influence the course of the prosecution. The test to be applied in deciding whether statements made to persons connected in such a way with the prosecution are voluntary is subjective. In other words what did the accused think? Whom did he think he was talking to? . . . Was he under the impression that the failure to speak to this person, because of his power to influence the prosecution, would result in prejudice or did he think that a statement would draw some benefit or reward? If his mind was free of such impressions the person receiving this statement would not be considered a person in authority and the statement would be admissible.

34 However, to this statement I would add that the accused’s belief that he is speaking to a person in authority must also be reasonable, in the context of the circumstances surrounding the making of the statement. If the accused were delusional or had no reasonable basis for the belief that the receiver of the statement could affect the course of the prosecution against him, the receiver should not be considered a person in authority. Since the person in authority requirement is aimed at controlling coercive state conduct, the test for a person in authority should not include those whom the accused unreasonably believes to be acting on behalf of the state. Thus, where the accused speaks out of fear of reprisal or hope of advantage because he reasonably believes the person receiving the statement is acting as an agent of the police or prosecuting

authorities and could therefore influence or control the proceedings against him or her, then the receiver of the statement is properly considered a person in authority. In other words, the evidence must disclose not only that the accused subjectively believed the receiver of the statement to be in a position to control the proceedings against the accused, but must also establish an objectively reasonable basis for that belief. For example, if the evidence discloses a relationship of agency or close collaboration between the receiver of the statement and the police or prosecution, and that relationship was known to the accused, the receiver of the statement may be considered a person in authority. In those circumstances the Crown must prove beyond a reasonable doubt that the statement was made voluntarily.²⁷³

The above two paragraphs from *Hodgson*, and indeed the entire case, are subject to a myriad of interpretations for the examiner of Mr. Big jurisprudence. For one thing, there is absolutely no doubt from the above passage that the subjective belief of the declarant is highly significant; i.e. his opinion of the person who received his statement, whom did he think he was talking to, what were the impressions of his mind? Also, with regard to the reasonableness of the belief, it should be noted that the belief referred to is not whether or not the receiver is real law enforcement, rather it is the belief that the power to affect the course of the prosecution was real.

Another concept here is that of influence. Does the declarant believe that the receiver can influence the prosecution? Does he have the power to do so? Can he affect the course of the prosecution? Does the evidence disclose a relationship of agency or close collaboration between the receiver and the police or prosecution and was that relationship known to the accused?

So, in one sense, a subjective belief in the ability of Mr. Big to influence a prosecution should arguably be enough to make the receiver of a Mr. Big confession, who is actually a police officer, a person-in-authority. It is true that Cory J. also makes

²⁷³ *Hodgson*, *supra* note 60 at paras. 33 to 34.

reference to the exclusion from the category of people whom the accused unreasonably believes to acting on behalf of the state. However, that is not really the situation in a Mr. Big context. In these stings the question is one of a declarant's arguably quite reasonable belief that a non-police actor can influence or control a prosecution.

There is no doubt that Cory J.'s conception of who can be a person-in-authority is not limited to known police officers. He notes that, depending on the circumstances, many different private citizens can be persons-in-authority, including a complainant's parent, a social worker, or the victim of a crime. What is important is the accused's perception of the receiver's relationship with the state and his belief that the receiver of the statement was allied with authorities and capable of exerting influence over an investigation of prosecution.²⁷⁴ Cory J. goes on to state that

36 The important factor to note in all of these cases is that there is no catalogue of persons, beyond a peace officer or prison guard, who are automatically considered a person in authority solely by virtue of their status. A parent, doctor, teacher or employer all may be found to be a person in authority if the circumstances warrant, but their status, or the mere fact that they may wield some personal authority over the accused, is not sufficient to establish them as persons in authority for the purposes of the confessions rule. As the intervener the Attorney General of Canada observed, the person in authority requirement has evolved in a manner that avoids a formalistic or legalistic approach to the interactions between ordinary citizens. Instead, it requires a case-by-case consideration of the accused's belief as to the ability of the receiver of the statement to influence the prosecution or investigation of the crime. That is to say, the trial judge must determine whether the accused reasonably believed the receiver of the statement was acting on behalf of the police or prosecuting authorities. This view of the person in authority requirement remains unchanged.²⁷⁵

²⁷⁴ *Ibid.* at para. 35.

²⁷⁵ *Ibid.* at para. 36.

The Supreme Court of Canada decided *Hodgson* at about the same time that Mr. Big cases were first starting to come to trial in British Columbia. Cory J.'s judgment really does not precisely determine what should be done with a Mr. Big statement. He refers to receivers of statements being seen as allied with the state authorities or as acting on behalf of the police or prosecuting authorities. The Mr. Big paradigm is arguably capable of fitting into such a paradigm. Clearly Mr. Big presents himself as 'allied with' corrupt police officers, prosecutors or even judges. It is, however, admittedly less tenable to say that Mr. Big purports to act 'on behalf of' police or prosecuting authorities (although one could say that the fictitious corrupt police are purported to act on Mr. Big's behalf). Nevertheless, the repeated emphasis placed by Cory J. on the importance of the subjective belief of the declarant that the receiver can influence the prosecution is hard to ignore.

All of the above being the case, it is now proposed to return to the situation in *R. v. Redd*. It is submitted that the Trial Judge missed the point in that case to conclude that Redd held an unreasonable belief that the receivers of his statement were acting on behalf of the state. Instead, like the majority of targets in his situation, what he really held was an arguably quite reasonable belief, based on the highly manipulative nature of the sting, that a powerful crime boss could influence the prosecution against him by exerting his power over corrupt justice system participants.

As far as Mr. Big stings are concerned, *Hodgson* is clearly not entirely on point and, without more, leaves some important questions unanswered on how exactly the fake gang and the fake crime boss should be viewed. The unanimous ruling in *Grandinetti* settled this issue and will now be looked at more fully.

The Supreme Court of Canada judgment is not terribly long, only 62 paragraphs, and the Court had more than just the issue of determination of person-in-authority status to address. All in all defence counsel throughout the trial and appeal process had attempted to rely on several grounds for exclusion of the target statements, including abuse of process, and whether or not there was a psychological detention and subsequent section 7 *Charter* violation.²⁷⁶ That said, by the time the appeal reached the Supreme Court of Canada only two issues were left. The main question to be addressed in this inquiry is that of whether or not the undercover officers should have been accorded the status of persons-in-authority.

However, the second issue, one which sets *Grandinetti* apart from the majority of other Mr. Big cases, is the fact that there really seemed to be a viable second suspect in the murder: a violent cocaine dealer named Rick Papin who was involved in the drug trafficking business with the victim, Connie Grandinetti. At the voir dices on admissibility of third party evidence, much evidence was led to show that there had been a falling out between Papin and the victim. It was alleged that there had been some dispute over whether the victim was selling drugs in Papin's territory, that Papin had broken into her home and threatened her with a knife about a year before the murder, that both Papin and the victim were police informers and that the victim had been planning to expose Papin while he was still incarcerated, and that Papin had been released from prison only a few days before her murder.²⁷⁷ Ultimately, Abella J.A. found that there was

²⁷⁶ *Grandinetti (C.A.)*, *supra* note 265 at para. 2.

²⁷⁷ *Grandinetti*, *supra* note 2, paras. 16 to 32.

insufficient evidence of motive, opportunity and access to the victim to allow the evidence of Papin's relationship with her to be placed before the jury.²⁷⁸

The Trial Judge's ruling on the person-in-authority issue, as restated by Abella J., has already been adverted to above. As stated before, voluntariness *per se* was not the precise issue in this case, but rather the person-in-authority rule. The unanimous judgment relied almost entirely on Cory J.'s judgment in *Hodgson* in deciding the issues in *Grandinetti*.

Among other things the Court noted that, although Cory J. explicitly considered doing away with the person-in-authority requirement, he declined to do so, at least partially out of a concern that it would render all statements made to undercover police officers subject to the voluntariness test.²⁷⁹ The Court also noted that a person in authority is "generally someone engaged in the arrest, detention, interrogation or prosecution of the accused".²⁸⁰

After making these observations, Abella J. turned to what, in the view of this thesis, is the crux of the issue, the belief of the target regarding the status of the person with whom he speaks:

38 The test of who is a "person in authority" is largely subjective, focusing on the accused's perception of the person to whom he or she is making the statement. The operative question is whether the accused, based on his or her perception of the recipient's ability to influence the prosecution, believed either that refusing to make a statement to the person would result in prejudice, or that making one would result in favourable treatment.

²⁷⁸ *Ibid.* at paras. 58-61.

²⁷⁹ *Ibid.* at para. 35.

²⁸⁰ *Ibid.* at para. 37.

39 There is also an objective element, namely, the reasonableness of the accused's belief that he or she is speaking to a person in authority. It is not enough, however, that an accused reasonably believe that a person can influence the course of the investigation or prosecution. As the trial judge correctly concluded:

[R]eason and common sense dictates that when the cases speak of a person in authority as one who is capable of controlling or influencing the course of the proceedings, it is from the perspective of someone who is involved in the investigation, the apprehension and prosecution of a criminal offence resulting in a conviction, an agent of the police or someone working in collaboration with the police. It does not include someone who seeks to sabotage the investigation or steer the investigation away from a suspect that the state is investigating.

(Alta. Q.B., No. 98032644C5, April 30 1999, at para. 56)²⁸¹

There are a couple of points worth making with regard to the above statement. In the first place, the Trial Judge appears to identify specifically a category of person who will not be considered a person-in-authority, i.e. someone who seeks to sabotage an investigation or steer attention away from a suspect. Abella J. identifies this approach as correct. Of course there is nothing plainly objectionable in this statement, especially since Cory J. more or less declared that the categories should remain open on the person-in-authority issue.

The really glaring problem is the more plainly logical one, i.e. the fact that Mr. Big **does not** fit into the category described. Mr. Big is involved in the investigation of the criminal offence. Furthermore, Mr. Big decidedly is not trying to sabotage the investigation or steer police scrutiny away from the target. Indeed, he is trying to intensify it. What the trial judge is describing, and Abella J. is endorsing, is the exclusion of a real crime boss from person-in-authority status. Mr. Big does not fit into this

²⁸¹ *Ibid.* at paras. 39-40.

definition.

The above quotation and comment constitute a good example of the type of logical conundrum the courts can get caught up in when attempts are made to justify the massive deception that the sting entails.

Of course throughout an examination of the Mr. Big jurisprudence attention is periodically drawn to the necessity and value of undercover police operations and the reasonable expectation that undercover officers should not normally be considered persons-in-authority. This was unsurprisingly the case in Abella J.'s decision in as well:

40 Although the person in authority test is not a categorical one, absent unusual circumstances an undercover officer will not be a person in authority since, from the accused's viewpoint, he or she will not usually be so viewed. This position is supported by precedent. As Cory J. explained in *Hodgson*:

The receiver's status as a person in authority arises only if the accused had knowledge of that status. If the accused cannot show that he or she had knowledge of the receiver's status (as, for example, in the case of an undercover police officer) . . . , the inquiry pertaining to the receiver as a person in authority must end. [para. 39]

See also *Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 664; *R. v. Todd* (1901), 4 C.C.C. 514 (Man. K.B.), at p. 527.

41 The appellant conceded that undercover officers are usually not persons in authority. His position is that although undercover officers are not usually persons in authority, when an undercover operation includes as part of its ruse a suggested association with corrupt police, who the accused is told could influence the investigation and prosecution of the offence, the officers qualify as persons in authority.

42 However, under the traditional confession rule,

a person in authority is a person concerned with the prosecution who, in the opinion of the accused, can influence the course of the prosecution.

(*R. v. Berger* (1975), 27 C.C.C. (2d) 357 (B.C.C.A.), at p. 385, cited in *Hodgson*, at para. 33)

43 This, it seems to me, is further elaborated in *Hodgson* by Cory J.'s description of a person in authority as someone whom the confessor perceives to be "an agent of the police or prosecuting authorities", "allied with the state authorities", "acting on behalf of the police or prosecuting authorities", and "acting in concert with the police or prosecutorial authorities, or as their agent" (paras. 34-36 and 47). He amplified this theory as follows:

Since the person in authority requirement is aimed at controlling coercive state conduct, the test for a person in authority should not include those whom the accused unreasonably believes to be acting on behalf of the state. Thus, where the accused speaks out of fear of reprisal or hope of advantage because he reasonably believes the person receiving the statement is acting as an agent of the police or prosecuting authorities and could therefore influence or control the proceedings against him or her, then the receiver of the statement is properly considered a person in authority. In other words, the evidence must disclose not only that the accused subjectively believed the receiver of the statement to be in a position to control the proceedings against the accused, but must also establish an objectively reasonable basis for that belief. . . .

. . .

. . . there is no catalogue of persons, beyond a peace officer or prison guard, who are automatically considered a person in authority solely by virtue of their status. A parent, doctor, teacher or employer all may be found to be a person in authority if the circumstances warrant, but their status, or the mere fact that they may wield some personal authority over the accused, is not sufficient to establish them as persons in authority for the purposes of the confessions rule. . . . [T]he person in authority requirement has evolved in a manner that avoids a formalistic or legalistic approach to the interactions between ordinary citizens. Instead, it requires a case-by-case consideration of the accused's belief as to the ability of the receiver of the statement to influence the prosecution or investigation of the crime. That is to say, the trial judge must determine whether the accused reasonably believed the receiver of the statement was acting on behalf of the police or prosecuting authorities. [paras. 34 and 36]²⁸²

²⁸² *Ibid.* at paras. 40-43.

Cory J.'s example of an undercover officer not being a person-in-authority is impossible to ignore. However, one must bear in mind that *Hodgson* was decided before the classic Mr. Big sting cases started reaching the courts.

Also of note is Abella J.'s comment in introducing Cory J.'s statement that "absent unusual circumstances an undercover officer will not be a person in authority". It is submitted that it would be helpful to have an example of an undercover operation more unusual than a Mr. Big sting.

Abella J. concluded;

44 The appellant believed that the undercover officers were criminals, not police officers, albeit criminals with corrupt police contacts who could potentially influence the investigation against him. When, as in this case, the accused confesses to an undercover officer he thinks can influence his murder investigation by enlisting corrupt police officers, the state's coercive power is not engaged. The statements, therefore, were not made to a person in authority.²⁸³

At this juncture it is necessary point out, or perhaps concede, that in fact the Supreme Court of Canada is the highest court in the land and if they choose to rule statements made by targets in Mr. Big stings admissible without a voluntariness inquiry they may do so. There may be good policy reasons for doing so, although in researching and writing this thesis it has not been possible to identify any. Clearly, Parliament has for the most part left determination of evidence law to the judiciary, and determine it they must in order for the legal system to function.

That said, the problem as submitted in this thesis is that, as has been argued previously with regard to the British Columbia Court of Appeal, the Supreme Court of

²⁸³ *Ibid.* at para. 44.

Canada has to a degree misinterpreted previous judgments, in this case the previous judgment of Cory J. in *Hodgson*. It is further submitted that McFadyen J.A.'s dissenting judgment at the Alberta Court of Appeal is more in keeping with Cory J.'s analysis than Abella J.'s.

In recounting the history of the case, McFadyen J. points out that the Trial Judge considered that there was insufficient evidence even to embark on a voir dire to determine whether or not he undercover officers were capable of being considered persons-in-authority. She noted the Trial Judge's ruling that the Mr. Big operatives

cannot be perceived as persons in authority. In my view, it is not enough that an accused reasonably believe that the person can influence the course of the investigation or the prosecution. It must be to obtain the object of the state and not the object of the criminal.²⁸⁴

(emphasis in original)

McFadyen J. went on to consider Cory J.'s definition of person-in-authority, noting that he took a broad view of that definition and emphasized the importance of the subjective opinion of the declarant. She continued:

[106] He acknowledged, however, that an accused's subjective perception must be reasonably held and set out this limitation at para. 34:

... where the accused speaks out of fear of reprisal or hope of advantage because he reasonably believes the person receiving the statement is acting as an agent of the police or prosecuting authorities and could therefore influence or control the proceedings against him or her, then the receiver of the statement is properly considered a person in authority.

[107] I do not take this to mean that the accused must be satisfied that there is a formal relationship of principal and agent based strictly upon advancing the

²⁸⁴ *Grandinetti*, *supra* note 265 at para. 99.

interests of the principal. Cory J. quickly went on to use other words to describe the relationship between a recipient and the state that could make someone a person in authority.

[108] At para. 34, for example, he spoke of a “relationship of agency or **close collaboration** between the receiver of the statement and the police or prosecution” (emphasis added). At para. 35, he spoke of the accused’s belief that the “receiver was **allied** with the state authorities and could influence the investigation or prosecution against the accused” (emphasis added). At para. 45, when discussing the circumstances when a trial judge would be obliged to proceed to a *voir dire* on her own motion, he said that the receiver must be “**closely connected** to the authorities” (emphasis added). In para. 47, speaking on this same subject, he used the words “**acting in concert** with the police or prosecutorial authorities ...” (emphasis added). Finally, at para. 49, when dealing with the facts of the appeal before the court, Cory J. made the following inclusive statement:

Indeed, anyone is capable of being a person in authority where a person becomes **sufficiently involved** with the arrest, detention, examination or prosecution of an accused, and the **accused believes that the person may influence the process against him or her.**
(emphasis added)

[109] In my view, therefore, the test for persons in authority, found in *Hodgson*, requires only that there be a sufficient relationship between the recipient of a statement and the investigating or prosecuting authorities, that an accused may reasonably infer that the recipient could affect the investigation or prosecution of the offence.²⁸⁵

It is submitted that McFadyen J.’s analysis ought to be the preferred one. Further on in her dissenting judgment she again identifies the two main components of the person-in-authority rule. Firstly, there must be a belief that the recipient of the statement must have a connection with and be able to influence the prosecution. Secondly, that belief must be reasonable. She notes that the test does not require that the declarant believe that any promise or inducement made “be for the good of the state” and that

²⁸⁵ *Ibid.* at paras. 106 to 109.

“[t]he law does not require that an accused...make a qualitative analysis of whether any promise or inducement furthers the object of the state.”²⁸⁶

This seems to be the more faithful interpretation of Cory J.’s judgment. Especially when one considers the statement he made in *Hodgson* (cited above) that anyone is capable of being a person-in-authority. As another support for her position, McFadyen J. notes that “[i]f it is a further qualification that, in fact, an actual relationship exists between the recipient and the prosecuting authorities, that fact is met here. The police are the recipients of the information.”²⁸⁷ This, of course, is a fact of which sight should not be lost.

Later, McFadyen J.A.’s concluding statement on the person-in-authority issue underlines the sensibility of including Mr. Big operators in the definition:

Here we have actual police officers going undercover to secure a statement from a suspect and escape the application of the confessions rule. At the same time, however, they wish to make use of the implied power and authority of the state to assist them in inducing the appellant to confess. The object of the confessions rule is to ensure that statements extracted by the police are reliable and that they have not been coerced by inappropriate state conduct. It makes sense, therefore, that the rule should apply to the police officers in this case.²⁸⁸

It is obviously the position of this thesis that Mr. Big operators are at least capable of being seen as persons-in-authority, especially in those situations when they pretend to be able to influence the justice system. Furthermore, it may be reasonable to ask what exactly is the nature of the justice system or the state in the subjective mind of the target. It has already been noted earlier in this thesis that targets tend to be unsophisticated. The

²⁸⁶ *Ibid.* at para. 113.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.* at para. 120.

views of unsophisticated individuals as to how the legal system and the state operate may be different from the views of judges and lawyers.

For example, in *R. v. Steadman* the accused testified that he believed the organization he was working for was legitimate and had legitimate connections to the prosecuting authorities.²⁸⁹ The trial judge noted that

[Steadman] said that he repeatedly asked K if everything was on the “up and up”, and he was repeatedly assured that it was. He said K told him the “boss had lots of high priced lawyers and contacts that could help out in just about anything”. In that regard, he said K told him they had contacts at the provincial, federal and municipal levels that could help out, although he could not recall anything more specific about what he was told about them. Mr. Steadman said K told him they had contacts that owed the organization favours, and by exchanging favours they were able to get things done.²⁹⁰

After having reviewed all of the scenarios in which Mr. Steadman participated, including the impressive “blood scenario” referred to in the first chapter of this thesis, the Trial Judge responded to Mr. Steadman’s purported belief in the organization’s legitimacy as follows:

[48] All of these events would have led even the most naïve individual to the conclusion that the organization and the men involved in it were criminals. Mr. Steadman testified that while he was suspicious of the nature of the organization’s business, he thought they had legitimate connections with government authorities. He testified he thought they might be police informants that were able to parlay information into “favours” from the police. These favours extended to legitimately removing him from any jeopardy for his involvement in Mr. Black’s disappearance. He was not able to explain exactly how, or even why, he thought that might be accomplished.²⁹¹

²⁸⁹ *Steadman*, *supra* note 26 at para. 24.

²⁹⁰ *Ibid.* at para. 33.

²⁹¹ *Ibid.* at para. 48

The Trial Judge in this case probably made the right decision. It is arguably unlikely that the target was as wildly naïve as he claimed to be. However, the argument made raises the question of what exactly the state or the legal system is and what a reasonable perception of it is. It seems as though judges tend to view the state as an individual entity similar to a person, or at least to a corporation

However, strictly speaking, the state is not an abstract, unidirectional, single-minded monolith. It is made up of individual human actors. It is submitted that Abella J. and the Trial Judge in *Steadman* are largely relying in their reasons upon an abstract notion of the state that functions as a self-aware organism rather than as the union of separate consciousnesses that it is.

The question arises as to where a line between the state and what might be called the non-state begin and end. Is it so unreasonable to believe that a powerful organization would exchange favours with the formal government in order to “get things done” as Steadman testified he believed was the case? And if this is the case where can authority really be said to begin or end?

The prevailing view also assumes the state to be a virtuous actor, but what would be a reasonable view regarding authority to a target who has experienced criminal actions or unfairness at the hands of the police or the state? Would it not be reasonable for that target to assume that corruption was normal and that unsavoury arrangements between the state and the underworld are the norm in some circumstances? And if that is indeed the case, as it certainly has been in different times and places in the world, we may need to ask ourselves who exactly it is who is being naïve.

More could be said on the person-in-authority issue, however, in the interests of brevity, the issue of the *Hodgson* warning will now be addressed. In many ways an uncontentious area, the significance of this area can be discussed in fairly short order. In *Hodgson*, Cory J. declined to eliminate the person-in-authority rule, but nevertheless suggested it would be appropriate in some circumstances for the trial judge to warn the jury about the dangers of relying on statements made to persons not in authority, especially when those circumstances included elements of violence, threats of violence, oppressive treatment, fear or degrading treatment:

29 The unfairness of admitting statements coerced by private individuals should be recognized. However, it is the sort of change which should be studied by Parliament and remedied by enactment. See *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *R. v. Salituro*, [1991] 3 S.C.R. 654; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at para. 93; *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925. Because of the very real possibility of a resulting miscarriage of justice and the fundamental unfairness of admitting statements coerced by the violence of private individuals, I would hope that the study will not be long postponed.

30 In the meantime I would suggest that in circumstances where a statement of the accused is obtained by a person who is not a person in authority by means of degrading treatment such as violence or threats of violence, a clear direction should be given to the jury as to the dangers of relying upon it. The direction might include words such as these: “A statement obtained as a result of inhuman or degrading treatment or the use of violence or threats of violence may not be the manifestation of the exercise of a free will to confess. Rather, it may result solely from the oppressive treatment or fear of such treatment. If it does, the statement may very well be either unreliable or untrue. Therefore, if you conclude that the statement was obtained by such oppression very little if any weight should be attached to it.” However, if a private individual resorts to violence or threatens violence after the statement has been made, this conduct will not as a general rule be a factor affecting the voluntariness of the statement and the suggested direction will not be needed.²⁹²

²⁹² *Hodgson*, *supra* note 60 at paras. 29 to 30.

The significance of this statement in relation to the Mr. Big sting is hard to miss. Many stings contain significant elements of threats of violence, violence, oppressive conduct and fear. That said, it is the case that many if not most judges do in fact deliver significant warnings to the jury from the bench in their instructions. Many times as well it is simply not a question raised by defence counsel either at trial or on appeal, possibly because they wish to concentrate their efforts on different legal issues.

That said, it has been the subject of judicial comment on a few occasions. In the previously mentioned case of *R. v. Forknall*, defence counsel argued that “given the pressure of the inducements under which the appellant made his inculpatory statements, they were inherently unreliable, and that it was incumbent upon the trial judge to caution the jury in clear and strong terms about the dangers of placing any significant weight on the statement”.²⁹³ There had been no objection made to the actual admission of the statements.

The British Columbia Court of Appeal quoted extensively from defence counsel’s submissions to the jury at trial, in which a significant amount of reference was made to the presence of fear and coercion in the “sophisticated and elaborate scenarios” orchestrated by the undercover operators.²⁹⁴ The Court of Appeal considered that the unreliability of the statement was brought to the jury’s attention in concluding a *Hodgson* warning was not necessary:

[42] I am similarly of the view in this case that it was not necessary for the trial judge to provide a *Hodgson* warning to the jury about the reliability of the appellant’s confession to the undercover police officers. Although the appellant

²⁹³ *Skiffington*, *supra* note 38 at para. 37.

²⁹⁴ *Ibid.* at paras. 34 to 36.

did not testify or call evidence as did the appellant in *Carter, supra*, the whole thrust of the defence in this case was that the confession was inherently unreliable. Defence counsel emphasized the reasons the appellant had to lie to B.A., his repeated denials of responsibility both in 1994 and subsequently, his financial difficulties, the attraction of easy money, the importance of his being trusted by B.A., and the need to admit the murder to him in order to gain his trust.

[43] The transcript of defence counsel's closing submissions shows that about 80% of it was devoted to discrediting the appellant's confession. That part of counsel's address concluded in this way:

So you've got a person who has a history of lying. Then you've got lies in the confession, and inaccuracies and inconsistencies, and then you've got all the reason in the world to lie in the confession. Well, when you give a liar all the reasons in the world to lie, what do you think you get? They knew he was a liar, they'd been having problems with him all the way along, lying, and then they dangled in front of him all these incredible inducements. What do you expect? I mean, really, what do you expect when you give a guy with a history of lying every reason in the world to lie? He would have been a complete fool not to have lied. He should risk his life that W.'s going to blow his brains out? He should give up \$50,000, the house, the home, all that stuff, just give it all up? He would have been a fool not to do what he did.

So that's it for the confession. I spent a lot of time on that because it's really, when it comes right down to it, the entire Crown case. That's all they've got, is the confession....²⁹⁵

Further to the above passage, the Court of Appeal noted that the Trial Judge's charge to the jury contained 21 paragraphs reviewing defence counsel's arguments on unreliability, and the fact that defence counsel at trial did not actually request an independent warning. All of that being the case, the Court of Appeal concluded that the jury must have been well aware that the confession was the major part of the Crown's case, that it might not be truthful and that it might therefore be dangerous to base a

²⁹⁵ *Ibid.* at paras. 42 to 43.

conviction on it. Hence, an additional warning was ruled to be “superfluous”.²⁹⁶

The issue of a *Hodgson* warning also arose in the previously mentioned case of *R. v. Bonisteel*. Defence counsel in this case argued that the Trial Judge’s instructions to the jury were not sufficient to bring home the unreliability of the target’s statements, but the British Columbia Court of Appeal disagreed, noting that “there is no particular form that the trial judge must follow in warning the jury about false confessions”.²⁹⁷ The Court of Appeal noted the sufficiency of the Trial Judge’s warning as follows:

[76] The trial judge’s instructions in this case went beyond explaining to the jury the motives for the appellant to lie. He discussed the known risk in criminal law of false confessions, and warned the jury that it is wrong to assume that people confess only to crimes they have actually committed. He spoke of the “manipulation of the target during an undercover sting”, and instructed the jury to take “great care” in considering the “veracity or credibility” of the appellant’s statements to Buck. He specifically told the jury that “confessions produced by an undercover operation such as this are viewed as inherently unreliable” and “highly suspect without independent confirmation of the truth”. He referred the jury to the circumstances in this particular case, including whether the appellant “[got] something wrong in his story to the Big Boss – such as the difference you may find it to be between his version of the number of the stab wounds inflicted on the girls and reality ...”. He expressed the opinion to the jury that “the accused got the number of stab wounds wrong”.²⁹⁸

²⁹⁶ *Ibid.* at paras. 44 to 45.

²⁹⁷ *Bonisteel*, *supra* note 33 at paras. 72 to 73.

²⁹⁸ *Ibid.* at para. 76.

All of the above being the case, the Court of Appeal found that there was “no merit to the argument that the trial judge’s instructions to the jury about false confessions were insufficient”.²⁹⁹

Not much more likely needs to be said about the *Hodgson* warning’s significance to Mr. Big stings. It is not a heavily litigated area and even if it were it seems as though most trial judges are alive to the necessity of warning juries about the dangers of unreliable confessions.

A final, and more ephemeral subject to be examined in this chapter is reliability in relation to Mr. Big sting target statements. The ephemeral aspect arises in an examination of the confessions rule itself and the wider principles underlying it, of which there appear to be two: the aforementioned reliability, as well as a concern for the administration of justice and fundamental principles of fairness. Although *R. v. Oickle*³⁰⁰ is reasonably considered to be the leading case on voluntary confessions, it is submitted that an initial focus on Cory J.’s decision in *R. v. Hodgson*³⁰¹ is more helpful in identifying these principles.

Cory J. notes that in the long history of the confessions rule both of the above mentioned wider underlying principles are of some antiquity. He cites English authority from the eighteenth century as a basis for both principles, but he also indicates a preference on the part of some judges for basing the confessions rule solely on reliability concerns and not on a fairness principle.³⁰² Nevertheless, Cory J. ultimately concludes that “from its very inception, the confessions rule was designed not only to ensure the

²⁹⁹ *Ibid.* at para. 77.

³⁰⁰ *Oickle*, *supra* note 57.

³⁰¹ *Hodgson*, *supra* note 60.

³⁰² *Ibid.* at paras. 17 to 18.

reliability of the confession, but also to guarantee fundamental fairness in the criminal process.”³⁰³

Expanding upon this, Cory J. continues:

19 Of particular significance is the relationship between these two concerns of reliability and fairness. It must be recognized that the purpose of the confessions rule is to exclude putatively unreliable statements, not actually unreliable statements. In other words, the confessions rule excludes statements obtained by force, threat or promises as somehow inherently unreliable, but does not inquire into the actual truth or falsity of the statement. If the concern of the confessions rule were truly the reliability of the statement, then the court’s inquiry would focus on objective corroboration of the confession evidence; if additional evidence confirmed the confession was accurate, it should be admitted under a reliability rationale.

20 Instead, the confessions rule asks only if the statement was voluntary, not if the statement is true. *DeClercq v. The Queen*, [1968] S.C.R. 902. This focus on voluntariness allows a court to analyse the circumstances surrounding the statement and effectively acts as a check on the abuse of state power. In other words, if the state were left with the option of simply corroborating forced confessions, there would be little incentive to refrain from reprehensible investigative measures. That is why the confessions rule automatically excludes involuntary statements, regardless of their veracity.³⁰⁴

Finally, Cory J. states that “the admission of evidence which may be unreliable does not per se render a trial unfair”³⁰⁵ and that

The confessions rule does not force a trial judge to exclude “unreliable” evidence that is highly probative of guilt. Rather it focuses on putative reliability, by analysing the circumstances surrounding the statement and their effect on the accused, regardless of the statement’s accuracy. Thus the “reliability” rationale and the “fairness” rationale for the confessions rule blend together, so as to ensure fair treatment to the accused in the criminal process by deterring coercive state tactics.³⁰⁶

³⁰³ *Ibid.*

³⁰⁴ *Ibid.* at paras. 19 to 20

³⁰⁵ *Ibid.* at para. 21.

³⁰⁶ *Ibid.*

In tackling the problem of voluntariness it is submitted that it is somewhat difficult to fully understand the rationale underlying the confessions rule in the way that Cory J. identifies it. The concept becomes somewhat more confusing when he asserts that the confessions rule, as it relates to the notion of fairness, is “based upon the principle against self-incrimination,”³⁰⁷ but shortly thereafter recognizes the fact that “a rationale for the confessions rule extending beyond trustworthiness is not always easy to locate.”³⁰⁸ Presumably the principle against self-incrimination as used here fits under the rubric of concerns for trial fairness and the administration of justice, while trustworthiness is a synonym for reliability.

Furthermore, the fact that, as Cory J. states, the confessions rule is more concerned with putative reliability than with a larger concept of reliability and that the admission of unreliable evidence will not render a trial unfair would seem puzzling to many.

All of the above being the case, and bearing in mind that Canada’s laws regarding voluntary confessions are difficult to parse when not examined in a clear context, it is nevertheless respectfully submitted that the tactics used in the Mr. Big sting are so manipulative and deceptive that it is impossible not to see them as capable of producing false confessions. This being the case, in addition to what Cory J. had to say about the confessions rule in *Hodgson*, it is also necessary to emphasize what Iacobucci J. had to say in *Oickle* about the confessions rule in relation to false confessions:

³⁰⁷ *Ibid.* at para. 22.

³⁰⁸ *Ibid.* at para. 23

68 While the foregoing might suggest that the confessions rule involves a panoply of different considerations and tests, in reality the basic idea is quite simple. First of all, because of the criminal justice system's overriding concern not to convict the innocent, a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness. Both the traditional, narrow *Ibrahim* rule and the oppression doctrine recognize this danger. If the police interrogators subject the suspect to utterly intolerable conditions, or if they offer inducements strong enough to produce an unreliable confession, the trial judge should exclude it. Between these two extremes, oppressive conditions and inducements can operate together to exclude confessions. Trial judges must be alert to the entire circumstances surrounding a confession in making this decision.³⁰⁹

Here we see that there is an overriding concern not to convict the innocent and that unreliable confessions should be excluded. This would seem to be slightly at odds with Cory J.'s seemingly equal treatment of reliability and trial fairness as well as his statement that an unreliable confession is not necessarily inadmissible.

Oickle of course did not deal with undercover operations, much less sophisticated Mr. Big operations. *Hodgson* did not deal with statements made to police at all, focusing mainly on the person-in-authority rule. Also, the main argument of this chapter is still that Mr. Big operators ought simply to be categorized as persons-in-authority. A major re-thinking of the common law of confessions may indeed not be desirable for anyone. Nevertheless, it is hoped that the discussion of all the different areas of the law covered up to this point in the thesis has demonstrated, at least to some degree, the various unreliable aspects of the statements that targets make.

In the second chapter of this thesis it was contended that the Canadian courts' treatment of Mr. Big confession evidence denotes an attitude towards fundamental notions of fairness that seems to have jumped the tracks; and that reliability, or perhaps

³⁰⁹ *Oickle*, *supra* note 57 at para. 28.

unreliability, should be something determinative, not something determined by resort to evidentiary rules that were obviously not designed with tactics like the Mr. Big sting in mind. What, after all, could be more unfair than admitting into evidence a statement or confession that, when viewed in the entirety of the problematic context in which it was made, may be entirely unreliable.

To examine only one significant part of the problematic context of the Mr. Big sting, one that has been touched on before in this thesis, it is submitted that the fact that Mr. Big sting targets are so prone to tell lies to undercover operatives is an excellent example of the determinative nature of reliability or the lack thereof in connection with these stings.

For example, in the case of *R. v. Redd* the lies told by the target to the undercover operators were significant. In an attempt to impress the undercover operators he made many false claims of criminal activity, most notable of which was a statement that he had murdered four people in Alberta.³¹⁰ This turned out to be untrue.

In *R. v. Fischer* the target apparently lied about a homicide other than the one under investigation as well, in order to make himself appear tough and capable, and also apparently to make himself appear somewhat righteous and possessed of a sort of criminal virtue. This was because the fabricated killing purportedly had something to do with avenging a female of his acquaintance who had been “wronged”.³¹¹

Not every lie told by targets is about killing. For instance, in *R. v. Lowe* the target made up a story about having been a diver in the Navy.³¹² This is a different matter than

³¹⁰ *Redd, supra* note 133 at para. 161.

³¹¹ 2005 BCCA 265, 197 C.C.C. (3d) 136 [*Fischer*] at paras. 27 to 29.

³¹² *Lowe, supra* note 14 at para. 251.

claiming to have killed someone, but the underlying motivation is arguably the same, an attempt to appear tough and capable and accomplished. It is also arguable that false claims are made by the targets in order to appear stereotypically strong and masculine and to be engaged in manly pursuits.

Of course, it is arguably highly significant in this analysis to point out that the wrongfully convicted Kyle Unger also made up false accomplishments and experiences in order to impress the undercover officers in the sting in which he was targeted. These included claims that he raced cars and snowmobiles, that he was experienced in demolitions, that he had a class one drivers' licence and that he had taken a course in forensic science among other things.³¹³

The main point to be made with regard to all of the above falsehoods and their relationship with reliability is that the Mr. Big sting, when viewed outside the framework of traditional common law approaches to confessions, is designed, intentionally or unintentionally, in such a way that it really cannot help but produce false statements.

To expand upon the above statement, it is definitely the case that, with one exception,³¹⁴ none of the targets in Mr. Big stings are actual gangsters. Only a very few of them even seem to express any interest in finding out what the name or type of the organization they have been recruited into is. How actual criminal gangs recruit new members is beyond the scope of this thesis, however, one hesitates to think it happens in the way that it does to the targets in the early Mr. Big scenarios.

³¹³ *Unger, supra* note 201 at para. 20.

³¹⁴ See *R. v. Ciancio, supra* note 241. Salvatore Ciancio had apparently had a history in organized crime. He was acquitted due to the inability of undercover operators to get him to admit guilt in relation to any crime.

The fact is that the targets are fundamentally impostors in an imaginary world from the very beginning. They know they are not themselves real gangsters but they wish to become so. This being the case, their only real choice is to enter into a sham performance, hence the lies so many of them tell in order to appear to be something they are not. The motivation is a promise of power, money and companionship.

One should remember that the targets are usually poor and often isolated. The message given by the undercover operators is that the gang has what the target wants: the target wants to become one of the group, the gang is powerful and wealthy while the target is weak and impecunious. Furthermore, the underlying message is that the gangsters are genuine, but the target knows that he is an impostor. Whether guilty of murder or not, it is absolutely clear that acceptance, and continuing in his own role, depends on the target saying what the gang wants to hear.

Arguably one of the hardest psychological decisions to make in life is to admit to being an impostor, and that is exactly what denying culpability means in a Mr. Big sting. The entire point of the sting is to make a target pretend to be something that he is not, or, from the point of view of the target himself, to make his newfound companions believe he is something that he is not. The target is not just motivated to lie, he is essentially being asked to lie.

A traditional application of the confessions rule; with its varying emphases on voluntariness, the person-in-authority, reliability and concerns from the administration of justice; seems ill-equipped to deal with the carefully orchestrated deception and manipulation of the Mr. Big sting. Contemporary hearsay and admissions rules, with

their focus on ‘indicia of reliability’ and ‘circumstantial guarantees of trustworthiness’ likewise seem unwieldy tools for testing Mr. Big statements.

All of the above being as it may, it is nevertheless, in concluding this chapter, respectfully submitted that the fairest way to deal with Mr. Big stings and the unreliable admissions they generate is to submit them to the traditional voluntariness test as outlined by Iacobucci J. in *R. v. Oickle*.³¹⁵ If this were to become the case then the tactics used by the police could be subject to judicial discretion, and likely many of the most suspect would fall out of use altogether, such as the promise to influence the prosecution and the violent scenario. On the other hand, the sting might very well fall out of use altogether if it were subject to such scrutiny.

Of course the clearest justification for submitting the sting to the voluntariness test relates to the first and main point made in this chapter, i.e. that when undercover officers tell the target they can influence the prosecution they become persons-in-authority under the confessions rule, and as such any statements made to them ought to be proven voluntary beyond a reasonable doubt. This is especially the case when one considers, as McFadyen J.A. pointed out in her dissent in the Alberta Court of Appeal, that

the very policy behind the voluntariness rule [is] that of ensuring fairness in the criminal process. The confessions rule serves to discourage police officers from engaging in undesirable investigative techniques. A police officer cannot promise a prosecutorial favour in return for a statement. To allow an undercover operation to rely on its relationship with the police to obtain a statement would be to allow the police to do indirectly that which it cannot do directly.³¹⁶

³¹⁵ *Oickle*, *supra* note 57.

³¹⁶ *Grandinetti (C.A.)*, *supra* note 265 at para. 117

CONCLUSION

This thesis has examined the Mr. Big sting in Canada in relation to various perspectives of criminal evidence law. In addition, an initial descriptive chapter attempted to describe more or less comprehensively all of the different scenarios that the undercover teams execute in order to convince their targets that they are being inducted into a criminal gang.

In each of the evidentiary issues covered; the right to silence, abuse of process, expert evidence, hearsay and admissions, and the confessions rule; it is clear that for whatever reason, Canadian judges in all jurisdictions and at the Supreme Court of Canada as well, seem committed to ensuring the admissibility of inculpatory statements arising out of these stings. This is despite the fact that so many of the sting's features and tactics seem to invite false statements from their targets. The gravity of these facts are compounded when one considers that in the majority of the trials of these targets there is no other evidence incriminating the accused and that they stand an excellent chance of being convicted solely on the basis of confessions which many judges agree are inherently unreliable.

Much more could be written about these stings. One particular omission that has been touched on only very briefly is the status of the sting in other common law jurisdictions. That said, it appears to be in use only in some states in Australia.³¹⁷ In the United Kingdom it would appear to be unheard of other than as described in the case of

³¹⁷ See *R. v. Tofilau*, *supra* note 4.

*R. v. Proulx*³¹⁸ in the chapter on abuse of process. In the State of Washington, at the time of writing, Sebastian Burns and Atif Rafay await the decision of the Washington Court of Appeal on whether or not the confessions to murder they made during a Mr. Big sting in British Columbia ought to have been admitted in their trial nearly eight years ago. At the present time each of them is serving a life sentence without the possibility of parole.

In Canada there has been one proven wrongful conviction as a result of the sting, that of the Kyle Unger. Once again it is important to bear in mind that in his case he was actually quite fortunate in that he was convicted on the basis of additional evidence that was later proved to be faulty. When the other evidence turned out to be without value, he was exonerated. If he had been convicted on the basis of the confession alone he would likely still be in prison. Only time will tell if future wrongful convictions will come to light.

In the final analysis, short of the outright abolition of the Mr. Big sting, it is the conclusion of this thesis that the best way to ensure its sensible use is to submit it to a formal voluntariness inquiry pursuant to the common law confessions rule. As it stands now, the power of the police in relation to the Mr. Big sting seems practically limitless, a fundamentally dangerous state of affairs.

³¹⁸ *Proulx*, *supra* note 160.

ADDENDUM ON SECONDARY SOURCES

As stated in the Introduction, the methodology employed in this thesis has consisted almost entirely of an examination of case law without much focus on articles or other secondary sources. The reasoning underlying the decision to proceed in that manner is twofold. Firstly, it is submitted that an analysis based entirely on jurisprudence is more persuasive and grounded in the *realpolitik* of Canadian criminal litigation than one based on secondary sources. The second and far more practical reason is the fact that very little has been written on the Mr. Big sting in Canada, especially compared to other areas of the law. That said, there is certainly some commentary worth mentioning and this addendum is intended to give some of the other research a brief overview in relation to the evidentiary issues discussed in the main body of the thesis.

The first work to be discussed is the one monograph available on the subject, Keenan and Brockman's aptly titled *Mr. Big*.³¹⁹ Keenan and Brockman's book is 133 pages long including all footnotes, references, and appendices. It is a comprehensive overview of how the sting works and the problems it raises. Admirable points about its content include its statistical analysis of the sting. The authors clearly went to some trouble in compiling exact or near-exact figures on various aspects of the sting. For example, they state that the sting has been run approximately 350 times since its inception, that the suspects were cleared or charged in 75 percent of cases with 25 percent remaining unresolved, and also that those charged face a 95 percent chance of

³¹⁹ *Kouri and Keenan, supra* note 19.

conviction.³²⁰ The authors also appear quite adept at finding out how much the stings cost the Canadian taxpayer, citing costs per operation ranging from \$137,000 (for Jason Dix, acquitted) to \$4,000,000 (for Salvatore Ciancio, acquitted).³²¹

Another valuable aspect of the book is its examination of those Mr. Big stings that, although interesting, were never subjected to judicial scrutiny for one reason or another and are hence not discussed in case law. These include *R. v. Rose*³²² among others.

As far as the evidentiary issues are concerned, Keenan and Kouri exclusively dedicate approximately twenty pages in their book to the issues discussed in this thesis.³²³ This being the case, their analysis, although never incorrect, tends to be a little thin in places. For example, their initial analysis of the confessions rule, including the Hodgson warning and the person-in-authority requirement, is only a little more than a page long and as such does not contain much exposition beyond stating the law as it developed in *Grandinetti* and *Hodgson*.³²⁴

Kouri and Keenan's initial analysis of hearsay in relation to the sting is even briefer, less than a page long. In this short passage they note that the law in this area is "fraught with inconsistencies" and also note the dissent in *Terrico*, in which guidance from the Supreme Court of Canada on the issue is requested.³²⁵

³²⁰ *Ibid.* at page 23.

³²¹ *Ibid.* at pages 23-24. Further valuable statistical analyses undertaken by the authors can be found at pages 52, 53 and 59.

³²² *Ibid.* at pages 7-10. *R. v. Rose* [1991] B.C.J. No. 4026 (C.A.); [1992] B.C.J. No. 279 (C.A.); [1998] B.C.J. No. 1360.

³²³ *Ibid.* at pages 65-75 and pages 101-111.

³²⁴ *Ibid.* at pages 68-69.

³²⁵ *Ibid.* at pages 75-76

At the conclusion of a second, roughly one-page long analysis of the hearsay issue in a later remedial section of the book entitled "Reining in Mr. Big", the authors conclude that "[w]ith the exception of extraordinary circumstances, it appears as though the judiciary will invariably rule the accused's confession to Mr. Big meets the required degree of threshold reliability".³²⁶

Mr. Big the book's examination of the *Charter* right to silence is a little more fully fleshed out and, indeed, examines some areas not covered in this thesis. For example, Kouri and Keenan discuss the case of *R. v. Moore*³²⁷ in which Mr. Big operatives took the target to Jasper, Alberta and put him up in a hotel prior to a meeting with the crime boss. The authors note the argument that this amounted to a detention, as Moore would have been unable to return to his home in British Columbia.³²⁸

Kouri and Keenan also put forth the argument that when a target has been previously arrested or detained in relation to a murder, and has refused to answer police questions related to that murder in accordance with his *Charter* right to silence, it is arguably a breach of the *Charter* for the police to utilize a Mr. Big sting to elicit a statement from that target subsequent to his release. To support this argument, the authors cite the dissenting judgment of Rice J.A. in the New Brunswick Court of Appeal.³²⁹

Aside from Kouri and Keenan's book, relatively little of import has been written on Mr. Big in Canada or elsewhere that is particularly germane to what has been discussed in this thesis. However, it is also useful to address briefly what some of the

³²⁶ *Ibid.* at page 102.

³²⁷ *Moore, supra* note 79.

³²⁸ *Kouri and Keenan, supra* note 19 at page 66.

³²⁹ *Ibid.* at page 67.

major scholars in Canadian evidence law have stated about evidentiary issues in general and apply it to the sting, although they have not said much in general about Mr. Big and its implications.

Three scholarly sources will be examined in this undertaking: *McWilliams' Canadian Criminal Evidence, Fourth Edition*;³³⁰ *Sopinka, Lederman and Bryant: The Law of Evidence in Canada, Third Edition*;³³¹ and “*The Confessions Rule and the Charter*”;³³² the first two being well-known textbooks and the latter being an article by Hamish Stewart.

In an attempt at brevity, only one over-arching legal theme will be discussed in this examination. However, that theme may be the most important one of all in relation to evidence: reliability. Reliability will be looked at in relation to three discrete evidentiary areas: hearsay/admissions, the confessions rule and, to a lesser degree, expert evidence.

To begin with, in examining a Mr. Big statement as an admission or hearsay, it is necessary to acknowledge that categorical exceptions such as the admissions exception are in any event unlikely to be modified by the courts. As Hill et al note in *Canadian Criminal Evidence*:

To date, the courts have been very conservative in re-thinking the wisdom of the exceptions. *Starr* stands as the only case where a categorical exception was modified to conform to the principled approach. For example, as we will see later in this chapter, challenges to the co-conspirators and past recollection recorded

³³⁰ S. Casey Hill et al, *McWilliams' Canadian Criminal Evidence*, loose-leaf (consulted on 1 November 2012), 4th ed (Toronto: Canada Law Book, 2003).

³³¹ Alan W. Bryant et al, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3d ed (Markham: LexisNexis Canada Inc. 2009).

³³² Hamish Stewart, “The Confessions Rule and the Charter” (2009) 54 McGill LJ 517.

exceptions have failed. This has led Don Stuart to write that "there seems little likelihood that existing exceptions will be re-configured".³³³

Despite the seeming unassailability of the law as it relates to admissions, the practice of admitting admissions without any recourse to the principled approach is not without some criticism. Later on in their discussion of hearsy, the authors of *Canadian Criminal Evidence* note that

in *R. v. Mapara* , while the Supreme Court cited *Evans* in its discussion of the rationale for the co-conspirators exception and noted the link between admissions and the co-conspirators rule, the court nevertheless considered whether the co-conspirator's exception satisfied the principled approach and also held that the "rare case" analysis applied to that exception. This would suggest that in rare cases, admissions by an accused could be subject to a necessity/reliability analysis.³³⁴

It is, of course, the contention of this thesis that there is no species of admission more amenable to a reliability analysis than that given by a Mr. Big target. To echo a proposition put forth earlier in this thesis, if one considers "rare" as roughly synonymous with "unusual", it is difficult to think of a rarer case than a Mr. Big sting and its attendant admissions.

Earlier in their discussion, Hill et al note that the central reason for the exclusion of hearsay evidence is its lack of reliability and, closely related, the inability to test its reliability.³³⁵ Although other concerns exist, which they identify as perception, memory and narration/transmission; clearly the most important aspect of the reliability issue is the sincerity of the declarant, i.e. was he or she honest when he or she made the out-of-court

³³³ *Hill et al, supra* note 330 at para. 7:40:20:30, page 42.

³³⁴ *Ibid.* at para. 7:160:10, page 125.

³³⁵ *Ibid.* at para. 7:20:10, page 8

statement.³³⁶ Later the authors discuss the importance of determining the presence or absence of a motive to fabricate on the part of the declarant.³³⁷

The centrality of sincerity and the presence or absence of a motive to fabricate is all fairly elementary at this stage of this thesis' analysis. However, it is a fact of which sight should not be lost. The Mr. Big sting is a quite anomalous technique. This is especially so when one considers that it is impossible to say whether there is a presence or absence of a motive to fabricate in a Mr. Big sting without knowing in advance whether the target is factually guilty or factually innocent. The crime boss is playing on the target's fear and greed to get him to admit that he has committed a murder. If he is guilty he has no motive to fabricate. But if he is innocent he does have a motive to fabricate.

This state of affairs makes it difficult to decide what to do about Mr. Big evidence. It is arguable that the bizarre nature of the sting serves to stymie the underlying assumptions of the rules of evidence. In fact it is arguable that, although our rules of evidence have evolved to comprehend undercover operations, it is doubtful that one can properly call a Mr. Big sting an undercover technique at all. Until this sting developed, most undercover operations consisted of infiltrations by state agents into criminal or other perceived anti-state organizations. This infiltration was frequently attended by the undercover operator assuming a degree of vulnerability in his or her work.

In a Mr. Big sting the vulnerability is all assumed by the target. In a sense, in many of the stings examined in this thesis, it is the target who assumes a persona, acting

³³⁶ *Ibid.* at para. 7:20:10, page 10.

³³⁷ *Ibid.* at para. 7:60:20, page 62-63.

macho and tougher than he really is, motivated by a desire for power, money, companionship and escape from a dull existence.

In regular undercover operations officers are frequently required to maintain their criminal profile on a continuous basis, twenty-four hours a day and seven days a week, never knowing when they may need to appear in-character for the benefit of the criminals they investigate. In a Mr. Big operation, officers only remain undercover during specific meetings with targets. Outside of those times they assumably are free to do as they wish.

Traditional undercover operations involve a make-believe criminal in a real world of violence and crime. Mr. Big operations involve a target who wants to be a real criminal (and who often actually does have a criminal record) attempting to infiltrate a make-believe world of organized crime. In these and other senses it is arguable that Mr. Big is not really a sting, a ploy, or a trick. Really it is better described as a scam, a con, or a grift. To describe the officers involved as being “undercover” is arguably less apt than describing them as confidence men.

Bearing the above criticisms in mind, it is useful to turn back to Hill et al and note what they have to say about hearsay and the role of historical change in its analysis:

Starr recognizes that not every exception will be completely consistent with the core values of necessity and reliability. Most were developed in very different times, many dating back two centuries. Our underlying assumptions about the world, the truisms of human behaviour that drive evidence reasoning, have changed radically since then. With other exceptions, the law may not be entirely settled as to what the preconditions are to admission. In either case the desirability of intellectual consistency, which is the cornerstone of a morally authoritative law of evidence, requires that exceptions conform to the principles of necessity and reliability as understood by modern courts, or that those exceptions be reformed or abandoned.³³⁸

³³⁸ *Ibid.* at para. 7:40:20:20, page 41.

Obviously it is the contention of this thesis that maintaining moral authority in the law of evidence requires more controls on the use of the Mr. Big tactic.

Bryant et al are less equivocal in their examination of admissions as hearsay. Indeed at one point they simply state without qualification that “[a]dmissions of a party are admissible against him or her in both civil and criminal cases”.³³⁹ The three authors are judges, and as is often the case in criminal judgments they cite the well-known passage from *R. v. Evans* in which Sopinka J. questions whether or not admissions are hearsay at all.³⁴⁰

Bryant et al also cite E.M. Morgan, among others, who agrees that admissions should be admissible on the basis of the adversary theory of litigation, and that an accused cannot object to its admissibility on the basis of his or her inability to cross-examine himself, or argue that his or her statements are not to be believed except when he or she is under oath.³⁴¹

Hill et al also note this phenomenon, likewise citing Sopinka J.’s statement in *Evans*, and also citing *Cross and Tapper on Evidence*, and that treatise’s characterization of a party’s complaint that his or her words are unreliable except when he or she speaks under oath as “an absurdity”.³⁴²

One objection to the above view of the law as it relates to admissions arises immediately: at no time in any of the Mr. Big judgments examined in this thesis do any of the targets claim that they are not to be believed except when speaking under oath.

³³⁹ *Bryant et al, supra* note 331 at para 6.405, page 364.

³⁴⁰ *Ibid.* at para. 6.397, page 361.

³⁴¹ *Ibid.* at para. 6.398, page 362.

³⁴² *Hill et al, supra* note 330 at para. 7:160:10.

Even when they are characterized as liars, or pathological liars, that claim is not made.³⁴³ Granted, if a target or his counsel were to make such a claim it would be absurd, but that is not the claim. The claim made by a target is different: he claims that his statement is not to be believed when he is making it subject to the very coercive inducements and atmosphere of a Mr. Big sting. This is hardly absurd.

The argument that an accused target cannot complain about his inability to cross-examine himself is also untenable and something of a red herring. In common-law systems it would seem notionally impossible for an accused to cross-examine himself. One can imagine a defence lawyer convincing his or her client to take the stand and then asking the judge to declare his or her client hostile so that he or she can be asked leading questions, but such a scenario surely exists only in the realm of the imaginary. Once again, it is necessary to point out that the Mr. Big target who wants his statement subjected to a necessity/reliability analysis is not complaining about what the scholars claim he is complaining about. He is claiming that his statements are unreliable because of the inherently unreliable circumstances under which they were made.

It is submitted that the theory of the adversary system is the only tenable reason for giving such unlimited admissibility to admissions. It is indeed fair in this sense. However, the level of deceit and coercion involved in the Mr. Big operation tends to decrease that impression of fairness, arguably to the point where the target's statement to Mr. Big should be subjected to a principled necessity/reliability analysis.

Much more could be said about hearsay and admissions and how the scholars' approach to them could be applied to the Mr. Big operation. However, in the interest of

³⁴³ Indeed, in the cases where pathological lying is suspected, the target's statements would not be believable even when they are made under oath.

brevity the confessions rule will now be discussed. Hamish Stewart, in his article about the intersection of the confessions rule and the *Charter* raises the issue of the overarching principle against self-incrimination:

The overarching principle against self-incrimination cannot, by itself, determine the precise content of the confessions rule, or of any other rule of evidence or procedure. There may be institutional differences in the way that legal systems manifest this principle. There may also be reasonable disagreement about the extent to which any given rule of evidence or procedure is consistent with this principle. Consider, for example, the Canadian holding that neither the common law confessions rule nor the section 7 right to silence applies to a suspect's statement where the suspect is not in custody and does not know that the listener is a person in authority. On the one hand, it might be argued that this rule of evidence complies with the principle against self-incrimination in that the suspect who freely, albeit foolishly, confesses to an undercover state agent is not being used by the state; rather, the state is simply taking advantage of the suspect's voluntary decision to furnish evidence against himself or herself, as if he or she had been speaking to another private individual. On the other hand, it might be argued that this rule of evidence violates the principle against self-incrimination in that the state uses deceit and trickery to deprive the suspect of the ability to make a properly informed decision about whether to speak.³⁴⁴

Here Stewart opines that the confession rule's not covering statements made to an undercover officer may nevertheless offend the overarching principle against self-incrimination because deceit and trickery operate to deprive the accused of the ability to make a properly informed decision.

Also of interest is the fact that Stewart appears to identify reliability as the only rationale underlying the confessions rule when he states:

the exclusion of a statement obtained in violation of the right to silence is a constitutional remedy under section 24 of the *Charter*, while the exclusion of an involuntary statement is simply a rule of evidence intended to protect the trier of fact from hearing potentially unreliable information. Thus, if the confessions rule is to be constitutionalized as a principle of fundamental justice under section 7 of

³⁴⁴ *Stewart, supra* note 332 at page 522.

the *Charter*, it should be treated as an aspect not of the right to silence but of the right to a fair trial.³⁴⁵

These interpretations of the law would seem to militate in favour of focusing more scrutiny on the Mr. Big sting.

As far as the focus on reliability is concerned, Mr. Big detractors have typically focused on the sting's relative likelihood of causing a false confession and a wrongful conviction rather than on the argument that police conduct needs to be controlled. If reliability is the only factor to be considered, that would seem to favour those detractors' argument.

Likewise, the theory that police deceit and trickery on their own could arguably violate the principle against self-incrimination, without even a person-in-authority requirement, would seem to suggest that Mr. Big stands on shaky legal ground. The sting is, after all, nothing but deception from beginning to end.

Hill et al also identify the police trickery aspect of the voluntariness test as standing alone as a distinct inquiry, however, they do not suggest that the person-in-authority requirement can be waived.³⁴⁶

Hill et al likewise note that reliability, if not the only rationale underlying the confessions rule, is certainly paramount. They state that the "rule is largely informed by the problem of false confessions"³⁴⁷ and they identify reliability as still remaining the rule's "primary concern".³⁴⁸

³⁴⁵ *Ibid.* at page 519.

³⁴⁶ *Hill et al, supra* note 330 at para. 8:40:20:40, page 28.

³⁴⁷ *Ibid.* at para. 8:10, page 2

³⁴⁸ *Ibid.* at para. 8:10:20, page 5.

This of course is in accord with the main argument of this thesis about the danger underlying the admission of Mr. Big evidence. It is weak and unreliable evidence. Indeed it has in some cases resulted in wrongful convictions. Its value is undermined by the outrageousness of the methods used to acquire it and their effects on the psyche of the targets. This contention has been elaborated upon in the main body of the thesis and probably needs no further elucidation in this addendum.

Finally, Bryant et al also discuss confessions at length, first identifying it as a type of admission and thus an exception to the hearsay rule.³⁴⁹ However, in our analysis, the most striking statement they make is the following final paragraph in their opening discussion of the person-in-authority:

In the context of declarations against penal interest, the Supreme Court has recognized that confessions delivered in “ordinary circumstances” to persons who are not in authority such as “an unestranged son, wife or mother”, may lack assurances of reliability because the “risk of penal consequences is not real and the declarant may have motives such as a desire for self-aggrandizement or to shock which makes the declaration unreliable.” Analogously, the potential for criminal self-aggrandizement calls into question the reliability of an accused’s out-of-court statement obtained in a Mr. Big strategy. Reliability is also a concern when statements are given as a result of violence, threats, inducements or oppression, regardless of whether the person receiving the statement is “in authority”. The Supreme Court has suggested that such statements may require exclusion under the doctrine of abuse of process or be admissible if accompanied by a strong caution to the jury. If, however, the underlying reliability rationale is absent, the latter position may be inconsistent with the principled approach to hearsay requiring an assessment of reliability as discussed in *R. v. Khelawon*.³⁵⁰

This assessment again focuses on reliability and the very real possibility of dishonesty on the part of the target, who is clearly also a hearsay declarant according to Bryant et al.

³⁴⁹ *Bryant et al, supra* note 331 at para. 8.2, page 417.

³⁵⁰ *Ibid.* at para. 8.22, page 426-7.

Once more, the desirability of greater safeguards against unreliable evidence is broached, as has often been argued throughout the main body of this thesis.

Again, much more could be said on the topic of the confessions rule, the scholars' assessment of it and its applicability to the Mr. Big sting. However, in the interest of brevity, the final area of evidence and its relationship to reliability will now be discussed: expert evidence.

Of course the approach to the concept of reliability is somewhat different in the case of expert evidence as the evidence proposed does not consist of the target's statement itself, but rather of an expert's assessment thereof. However, the ultimate issue being put to the trier of fact is still the reliability of the statement.

The Hamish Stewart article does not address expert evidence, and indeed the other scholars consulted in the research for this addendum do not offer much on this area as it relates to statements made by accused persons.

Bryant et al also do not discuss expert evidence relating to accused's statements at any length. However they do make the interesting observation that "[h]istorically, the so-called ultimate issue rule has been ignored by many Canadian and English courts".³⁵¹ This is significant to the Mr. Big analysis as it could be argued that an expert witness proposed by the defence in a Mr. Big case is giving evidence on the ultimate issue if he or she plans to give evidence touching on the veracity of the statement.

Bryant et al further note that

there are certain subject matters which go right to the very heart of judicial decision-making and courts remain wary of expert witnesses providing advice as to how they should decide issues such as whether a witness is telling the

³⁵¹ *Bryant et al, supra* note 331 at para. 12.147, page 828.

truth....Perhaps it is just a matter of sensitivity over the way the expert gives his or her evidence. For example, a court would be loath to receive explicit evidence from an expert that an accused is guilty or innocent....However, it will readily receive evidence which is not so direct but which, if accepted, inescapably leads to that conclusion.³⁵²

Perhaps the point to be taken from the above is that the reliability of expert evidence is something that tends to be decided on a case-by-case basis. This would seem to be borne out by an examination of the Mr. Big judgments, in which such evidence has indeed been admitted occasionally.

Hill et al's take on expert evidence includes the following statement:

The gate-keeper function must afford the parties the opportunity to put forward the most complete evidentiary record consistent with the rules of evidence and consideration of the admission of expert opinion evidence tendered by the defence must take into account the long-standing reluctance to restrict the power of an accused to call evidence steeped in concern that no innocent person be wrongfully convicted.³⁵³

A few pages later they state that

in criminal trials, psychiatric and psychological expert testimony as to an accused's mental disorder or state of mind was first admitted, long before the use of empirical testing instruments, more out of a concern to avoid a miscarriage of justice relating to criminal responsibility than with any real confidence in the reliability of the diagnoses. The necessity to avoid a wrongful conviction has warranted reliance on such evidence to this day.³⁵⁴

The approach put forth in these passages would seem to suggest that reliability of expert evidence is secondary to vigilance against wrongful convictions.

³⁵² *Ibid.* at para. 12.156, page 833.

³⁵³ *Hill et al, supra* note 330 at 12:30:10, page 23

³⁵⁴ *Ibid.* at 12:30:20:10, page 28.

The ever-present menace of wrongful convictions is probably the best image and idea with which to conclude this addendum and this thesis. The prospect of a devastating sentence for a serious crime which one did not commit is the fearful rationale underlying this whole thesis. Indeed it is arguably the underlying rationale of all criminal evidence law.

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