

A Catalyst for Change?

A Systems Analysis of the New Admissibility Test Developed in
R v. Hart [2014]

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Abstract

Past research has highlighted various problematic issues related to the use of the RCMP undercover operation entitled the “Mr. Big” sting. In a landmark decision, *R v. Hart* [2014], the Supreme Court of Canada recognized many problems with it and implemented a new admissibility test that would render confessions obtained by the undercover operation presumptively inadmissible. This research project explores the impact that this new evidentiary rule has had on cases involving “Mr. Big” confession evidence since the *Hart* decision (2014 to 2016). A content analysis was conducted on 16 cases that applied the new admissibility test. The case analysis revealed several important findings from cases that have applied the new admissibility test following *Hart*. In order to situate these findings, General Systems Theory was used to illustrate the impact that the court’s interpretation of the new evidentiary rule could have on the different components of the criminal justice system. It will be important for future research to further examine the impact of the new admissibility test in order to enhance our understanding of the influence it has had on cases involving “Mr. Big” sting confession evidence.

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To conclude, I have learned a lot about myself as a person, and as a writer throughout this entire process. I hope this project serves to contribute to the literature about the Mr. Big sting, and also extends the discussion to determine whether or not the new evidentiary rule from *Hart* actually produces change.

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Introduction

In 2001, *R v. Mentuck*¹ was before the Supreme Court of Canada. The case centered around confession evidence from an RCMP undercover operation known as a “Mr. Big” sting. The main issue before the court was a publication ban that was imposed by the trial judge on the identity of the undercover officers who participated in the operation, which was implemented in order to protect their safety. The Supreme Court of Canada upheld the trial judge’s decision to not implement a full publication ban on the nature of the police practices used in the case.² However, the Supreme Court also made a significant distinction when it decided that a publication ban concerning the operational methods used in the undercover operations was unnecessary.³ The ruling to deny the publication ban on the operational methods used in these RCMP operations was significant, as it became the first time the media and general public would have access to the details of the techniques and scenarios used in the undercover operation. This access granted the media and others the ability, for the first time since the RCMP operation had first been used, to learn more about the operation itself and the tactics used.

This public access illustrated how a typical “Mr. Big” sting was undertaken. Typically, it occurs in cases when the RCMP target an individual who they suspect has committed a serious crime, but they do not possess sufficient evidence to arrest them. In a “Mr. Big” operation undercover officers from the RCMP pose as members of a fictitious criminal organization, and the operation begins with these officers establishing a relationship with the suspect in an attempt to lure the suspect into joining the organization. The suspect then becomes a partial member in the organization, completing a range of different tasks in exchange for financial payout and other benefits given by the organization. The organization also persistently stresses core values such as trust, honesty, and loyalty throughout the operation. In line with these core values, the suspect

¹ *R v. Mentuck*, [2000] M.J. No. 447 (Q.B.) [*Mentuck*]

² *Ibid* at para. 61

³ *Ibid* at para. 45

and the undercover officers typically develop a close friendship. Throughout the operation, violent scenarios are also used as a way to gauge the suspect's comfort level with violence. Lastly, the undercover operation concludes with a meeting with "Mr. Big" where it is made clear that in order to attain full-time membership within the organization, the suspect must be truthful about all past criminal history. At this time, "Mr. Big" also informs the suspect that he is a man who is able to 'fix' any criminal problems that the suspect is facing, as long as the suspect is truthful with him. It is during this meeting that a suspect will typically confess details, true or not, of the crime being investigated, after which the suspect is arrested.

As the details of these tactics came to light, legal scholars and academics began to question the extent to which these techniques could serve to potentially produce confessions that are unreliable (Dufraimont, 2008; Keenan & Brockman, 2010; Khoday, 2013; Moore, Copeland, & Schuller, 2009; Nowlin, 2004; Poloz, 2015; Puddister & Riddell, 2012; Smith, Stinson, & Patry, 2009; Sukkau, & Brockman, 2015). My own interest in the use of the undercover operation began, when in a fourth-year course during my undergraduate degree I viewed a documentary⁴ that highlighted the various troublesome aspects of the operation.

Eventually, the courts began to acknowledge the reliability issues of confessions gained in this manner. This recognition came to a head in the landmark case, *R v. Hart* [2014]⁵, which was adjudicated by the Supreme Court of Canada.⁶ The court acknowledged that the tactics used in "Mr. Big" operations raise the possibility of producing unreliable confessions that could

⁴ The documentary was entitled *Mr. Big* and was directed by Tiffany Burns in 2007. The film was about how her brother, Sebastian Burns, and co-accused Atif Rafay, were convicted as a result of a "Mr. Big" sting. Burns argued that the tactics used in this operation induced and coerced Rafay and Burns into making a false confession (Burns, 2007).

⁵ *R v. Hart*, [2014] S.C.J. No. 52 [*Hart*]

⁶ This sparked my interest for this topic again, as I was in attendance on December 3, 2013 when the case was heard by the Supreme Court of Canada.

potentially lead to wrongful convictions.⁷ Accordingly, the Supreme Court of Canada developed a new two-pronged admissibility test, which renders confession evidence from a “Mr. Big” operation presumptively inadmissible. The new evidentiary rule focuses primarily on the reliability of the confession and whether the undercover officer’s actions in the operation represent police misconduct. Given my prior interest in this subject area, I decided to explore the effect that this new admissibility test would have on future cases involving “Mr. Big” confession evidence, asking the question: *What impact has the decision in Hart had on subsequent cases using similar undercover methods?*

This thesis thus aims to contribute to the current literature regarding the “Mr. Big” sting as well as comment on the tactics used in this RCMP operation and the impact of the newly developed admissibility test. Chapter One begins by highlighting the different types and causes of false confessions in a custodial setting, and how the tactics used in the extra-custodial setting of a “Mr. Big” sting embody many similar questionable attributes. Chapter Two then reviews relevant case law concerning the admission of confession evidence, outlining specific challenges that have argued why “Mr. Big” confessions should be inadmissible, while illustrating how the new two-pronged admissibility test addresses some of these challenges. Next, the methodology of the study in Chapter Three outlines the data collection and analysis procedures used in this study. Further, Chapter Four describes the conceptual framework adopted for this study. General Systems Theory provides the foundation for this conceptual framework that examines the impact of the new evidentiary rule. The findings and discussion in Chapter Five highlight the results of the qualitative case analysis and situate these findings within the systems perspective in an attempt to illustrate the impact in which the case decisions in this analysis have on different components of the criminal justice system. Finally, the concluding chapter will revisit the major

⁷ *Hart supra* note 5 at para. 5

findings of this study and end with some suggestions concerning directions for future research regarding.

CHAPTER 1

False and Unreliable Confessions

Introduction

False confessions represent one of the most significant causes of wrongful convictions. Since the advent of DNA forensic analysis, studies have shown that 14-25% of wrongful convictions have resulted from false confession evidence (Drizen & Leo, 2004; Garrett, 2008; Leo, 2009). At the same time, false confessions appear to be one of the most misunderstood causes of wrongful convictions given that providing a false confession requires self-destructive behaviour that acts against self-interests (Leo, 2009). As a result, many believe that no innocent person would confess to a crime they did not commit (Leo, 2009). In order to understand more about why innocent people falsely confess to crimes they did not commit, it is important to first define a false confession, and then examine the different types of false confessions that can occur. An examination of the two main causes of false confessions will be explored: police interrogation techniques and the individual circumstances of the suspect. The serious consequences that follow a false confession will be illustrated by demonstrating the significance that confession evidence carries in convicting an accused person. Lastly, an analysis of the techniques used in a “Mr. Big” sting will highlight how the police tactics used in this undercover operation are similar to the techniques used by police in custodial settings that have in the past produced unreliable, and in some cases false, confessions.

Defining False Confessions

According to Ayling (1984) a false confession occurs when the confessor is totally innocent of the crime that they have confessed to, or secondly, when the confessor was actually involved in the offence, but their involvement in the alleged crime is overstated. Ofshe (1989) provides a more comprehensive definition stating that “a confession is considered false if it is

elicited in response to a demand for a confession and is either intentionally fabricated or is not based on actual knowledge of the facts that form its content” (p.13). Expanding on this definition, Ofshe and Leo (1997b) deem that a false confession is “a detailed admission to a criminal act that the confessor either did not commit or is, in fact, ignorant of having committed” (p. 240).

There are two major components of a false confession: the first is an admission, which is typically represented by an “I did it” statement (Leo, 2009), and the second is the post-admission narrative that is provided in conjunction with the admission statement, which consists of a detailed account of how and why the alleged crime took place (Leo, 2009). Due to the significant role post-admission narrative plays in a confession, Leo and Ofshe (1998) emphasize the importance of reviewing the content of this narrative in terms of reliability. First, it must be determined whether or not the post-admission narrative leads to the discovery of evidence unknown to the police. Furthermore, the post-admission narrative should include both highly unusual features of the crime and also accurate descriptions of the crime scene that are not public knowledge (Leo & Ofshe, 1998). These three aspects of the post-admission narrative can determine whether or not special knowledge is present, and if so the confession may be deemed reliable so long as it was not distorted by contamination.⁸

Types of False Confessions

The first researchers to typologize false confessions were Kassin and Wrightsman (1985) who developed a typology in relation to the psychological aspects of the interrogative process. These types of false confessions include: voluntary, coerced-compliant, and coerced-internal.

⁸ Contamination would occur when a suspect learns of previously unknown facts about the crime and crime scene from the police, media, crime scene visits, or a third party (possibly the real offender) (Leo & Ofshe, 1998).

Voluntary false confessions occur when individuals offer a confession without any external pressure from the police. An individual may provide a voluntary false confession in response to a “morbid desire for notoriety” (Kassin & Wrightsman, 1985: p. 76), wherein they possess a pathological desire to become famous, even in exchange for receiving punishment (Gudjonsson, 2003). Other possible explanations include, “an unconscious need to expiate guilt over previous transgressions via self-punishment, the hope for a recommendation of leniency, and a desire to aid and protect the real criminal” (Kassin & Wrightsman, 1985, p. 77). Such individuals may be unable to distinguish facts from fantasy and cannot differentiate real events from events that are developed in their imagination (Gudjonsson, 2003).

Romeo Phillion, who spent 31 years in prison wrongfully convicted for a murder he did not commit, offered a voluntary false confession. During the ministerial review of his conviction, it was determined that Romeo possessed many qualities of a voluntary false confessor, including: a desire for notoriety to enhance his low self-esteem; an inability to distinguish fact from fantasy possibly brought on by conditions of antisocial and borderline personality disorders; and the goal of enacting revenge wherein Mr. Phillion wanted to take “his revenge out on the police (i.e. sending them on a wild goose chase)”.⁹ Leo (2009) notes that investigators are fairly skeptical of the reliability of voluntary confessions and are more likely to discount them compared to confessions that are elicited by way of interrogation. In Phillion’s case, however, his confession was used as evidence against him.

Coerced-compliant confessions occur as a result of the pressure and coerciveness of the interrogation process, wherein the suspect confesses to meet the demands of the interrogator in order to receive some form of immediate instrumental gain (Kassin & Wrightsman, 1985). The perceived instrumental gain usually takes the form of:

⁹ *R v. Phillion*, [2009] O.J. No. 202 (C.A.) at para. 207

“...being allowed to go home after confessing; bringing the interview to an end; a means of coping with the demand characteristics, including the perceived pressure, of the situation; and avoidance of being locked up in police custody” (Gudjonsson, 2003: p.196).

Additionally, Leo (2009) states that the most powerful inducement that a suspect can face is the promise of a more lenient punishment, since the pressure of the interrogative process can lead the suspect to believe their situation is hopeless (Gudjonsson, 2003). The suspect may be partially, or fully, aware of the consequences of providing the confession, but the perceived short-term gain outweighs the undetermined long-term consequences (Gudjonsson, 2003). This mindset is due to the suspect’s naïve belief that investigators will eventually determine the truth and the negative consequences of providing the false confession will not come to fruition (Gudjonsson, 2003; Kassin & Wrightsman, 1985).

An infamous example of a coerced-compliant false confession is the case of the Central Park Five, a group of teenagers who falsely confessed to sexually assaulting and beating a female jogger in 1989. During the interrogation, officers physically assaulted the five suspects, who were between the ages of 14-16, while yelling and cursing at them. In addition to these coercive tactics, interrogators told the boys that they were just being questioned as witnesses, and that they could be released from custody once they offered a confession implicating the other boys (Drizen and Leo, 2004). All boys confessed to attain the instrumental gain of what they thought would be a more lenient punishment and to end the physical and verbal assault from the officers. While all five were convicted in 1990, their convictions were later overturned in 2002 when the actual perpetrator confessed to the crime, and DNA evidence convicted him.

The third type of false confession is categorized as a coerced-internalized false confession. These occur when the confessor comes to believe, throughout the course of the

interrogative process, that they have committed the crime even though they have no memory of doing so (Kassin & Wrightsman, 1985). This is most likely a result of memory distrust syndrome, in which “people develop profound distrust of their memory recollections, as a result of which they are particularly susceptible to relying on external cues and suggestions” (Gudjonsson, 2003: p.196). There are two forms of memory distrust syndrome: the first is when the suspect has no memory of the offence, even if they in fact committed the crime, due to factors such as amnesia or alcohol consumption. The second form occurs when the suspect loses their recollection of not committing the offence over the course of the interrogation due to manipulative tactics that create a distrust in their own memory (Gudjonsson, 2003).

An instance of Memory Distrust Syndrome causing a false confession was evident in the case of Peter Reilly, who, at Eighteen years of age, called the police after finding his mother murdered in their home. During the interrogation that lasted over 24 hours, interrogators produced results of a fake polygraph test indicating Reilly’s guilt. Despite lacking any recollection of committing the crime, Reilly shifted from denying the crime to doubting his memory and began to conclude “well, it really looks like I did it” (Kassin, 2006: p. 173). A full written confession followed. Reilly was convicted in 1974 and his conviction was overturned two years later based on evidence withheld by the prosecution that proved he could not have committed the murder.

Kassin and Wrightsman’s (1985) model of false confessions has been criticized for its heavy reliance on aspects of coercion, as some individualized stress or pressure is not always a result of police coercion (Ofshe & Leo, 1997a). Gudjonsson (2003) developed a modified framework typifying false confessions, which include: voluntary, pressured-internalized, and

pressured-compliant false confessions. The use of the word “coerced” was replaced by “pressure” since there are external pressures that exist free of police coercion. For instance, a fear of being in custody, exhaustion, or withdrawal symptoms from drugs or alcohol represent internalized pressures, whereas interrogation techniques that use psychological manipulation characterize aspects of a pressured-compliant false confession. Moreover, the modified framework includes the sources of the pressure faced by the suspect, which are either internal¹⁰, custodial¹¹, or extra-custodial.¹² This modified framework represents a well-rounded typology of false confessions¹³, as it addresses both the type, and the source, of pressure that can lead an individual to falsely confess, while reframing the use of “coerced” to “pressured” in order to include all potential causes of a false confession.

The Causes of False Confessions: Problematic Interrogation Techniques and Vulnerable Suspects

The majority of false confessions are caused by coercive or manipulative police interrogation techniques, in conjunction with a suspect’s vulnerabilities (Kassin, 2008; Leo, 2009). Police-induced false confessions result from a multi-step process involving techniques that embody persuasion, compliance, and psychological manipulation (Leo, 2009). These interrogative techniques are employed with the singular objective of eliciting a confession; they are not focused primarily on inquiring about the truth in terms of a suspect’s alibi or denials, but

¹⁰ The internal source refers to the individual possessing a psychological need to confess, much like the voluntary false confession in the Kassin-Wrightsmen (1985) model.

¹¹ The custodial source of pressure is embodied in the typical setting of an interrogation room.

¹² Non-custodial pressures include “persons other than the police pressuring or coercing a confession from an innocent person (e.g. a peer, a spouse, a cell mate in prison or undercover police officers)” (Gudjonsson, 2003: p.212). A suspect may face non-custodial pressures when subjected to a “Mr. Big” sting. The non-custodial pressure in relation to the “Mr. Big” sting will be discussed in more detail later in this chapter.

¹³ In regards to other typologies of false confessions, McCann (1998) added a fourth type of false confession to the Kassin & Wrightsmen model, which was a coerced-reactive false confession, where a person is pressured to confess by someone outside of law enforcement (p. 449). Ofshe and Leo (1997b) offer a separate model of confessions that is directed at both true and false confessions, which consists of voluntary, stress-compliant, coerced-compliant, non-coerced compliant, and coerced-persuaded confessions.

are solely focused on obtaining incriminating statements and admission of guilt from the suspect (Drizen and Leo, 2004).

According to Kassin (2008), when the tactics of isolation, confrontation, and minimization are used by interrogators the likelihood of a false confession increases. In this process, the suspect is first isolated in the interrogation room in an attempt to increase their anxiety and desire to escape the situation. Confrontation involves the interrogator accusing the suspect of committing the crime, a claim that is typically bolstered by the presentation of real or fictitious evidence. This tactic is employed in order to show the suspect that there is indisputable evidence supporting their guilt, and that their arrest, prosecution, and conviction are all but certain (Drizen & Leo, 2004; Kassin, 2008). False evidence can include falsified eye witness identification statements, hair samples, doctored videotapes, false fingerprints, and fake polygraph test results (Drizen & Leo, 2004; Kassin, 2008). The presentation of false evidence is problematic since misinformation can significantly influence an individual's perceptions, beliefs, memories, and behaviour (Kassin, 2008).¹⁴

Minimization occurs when interrogators diminish the severity and consequences of the offence by offering sympathy to the suspect, while also citing moral justifications for committing the offence (Kassin, 2008). When minimization occurs, the suspect's psychological state is altered and they begin to believe that they will receive more lenient treatment after they provide a confession (Kassin, 2008).

¹⁴ The effects of presenting false evidence and misinformation is illustrated in a study conducted by Kassin and Kiechel (1996). In this study, college students were required to type on a keyboard, in what they believed was a test to measure their reaction time. After the typing had concluded, the students were accused by the researchers of having pressed a key, one that they were instructed not to, which caused the computer to crash. The students were asked to sign a confession sheet. In some instances, a researcher would state that they had witnessed the student pressing the forbidden key. The presentation of this false evidence nearly doubled the number of students who offered a written confession, as the number of written confessions signed by students increased from 48% to 94% after the introduction of the false evidence.

One interrogation method that embodies the tactics of isolation, confrontation and minimization is the Reid Technique¹⁵, used frequently by police forces in the United States¹⁶. When using the Reid Technique, interrogators hold an initial, non-accusatory meeting with the suspect to inform him or her of their perception of guilt (Inbau, Reid & Buckley, 1986). If the police believe a suspect may be guilty, an interrogation will commence, which includes nine main steps: the use of direct positive confrontation¹⁷; theme development¹⁸; handling denials¹⁹; overcoming objections²⁰; procurement and retention of a suspect's attention²¹; handling the suspect's passive mood²²; presenting an alternative question²³; having the suspect orally relate various details of the offence²⁴; and converting an oral confession into a written confession.²⁵

¹⁵The technique was developed by Fred Inbau, John Reid, and Joseph Buckley in 1986 (Criminal Interrogation and Confessions, Baltimore, MD: Williams & Walkins), and later revised in 2001.

¹⁶ In Canada, the Reid Technique is also used, but recently came under scrutiny in *R v. Chapple*, [2012] A.J. No. 881. In a *voir dire* to determine the admissibility of confession evidence obtained by the use of the Reid technique, provincial judge Mike Dinkel, denied admissibility of the evidence stating "I find the interrogation was aggressive, prolonged and psychologically manipulative. It created an atmosphere of oppression that overcame the accused's free will. On that basis, I am not satisfied beyond a reasonable doubt that the confession of May 5, 2011, was voluntary" (*Chapple*, para. 130).

¹⁷ This step involves "a direct, positively presented confrontation of the suspect with a statement that he is considered to be the person who committed the offence" (Inbau et al., 1986: p.79). (*Confrontation*).

¹⁸ "The interrogator expresses a supposition about the reason for the crime's commission, whereby the suspect should be offered a possible moral excuse for having committed the offence" (Inbau et al., 1986: p.79). Usually the interrogator will use tactics like stating that anyone else in the same situation would have committed the offence, or condemn the victim (*minimization*).

¹⁹ In this technique, denials are unwanted since denials mean that it will be more difficult for the interrogator to persuade the suspect to confess. Thus, this step entails "cutting off the suspect's repetition or elaboration of the denial and returning to the moral excuse theme" (Inbau et al., 1986: p. 80).

²⁰ The rationale supporting this step is that innocent suspects are thought to continue denying involvement in the crime, where guilty suspects change strategies over the course of an interrogation. This step involves "overcoming the suspect's comments about the moral excuse element presented in Step 2. These comments will consist of what may be viewed as 'objections' from the suspect, presented in the form of explanations as to why the suspect did not or could not commit the crime. These responses are normally offered by a guilty suspect" (Inbau et al., 1986: p.80).

²¹ Since there could be a sign of withdrawal from the suspect, Step 5 involves "the procurement and retention of the suspect's full attention ... Helpful in achieving this is an increase in the closeness of the previously described seating arrangement between interrogator and suspect" (Inbau et al., 1986: p.80).

²² "This step should occur when the suspect becomes quiet, displays a tendency to listen, or tries to avoid looking directly at the interrogator. Physical signs of 'giving up' may begin to appear. At this point, there should be a reinforcement of eye contact between the suspect and the interrogator. Tears that may appear in the suspect's eyes at this time usually are indicative of deception and also of a 'giving up' attitude" (Inbau et al., 1986: p.80).

²³ This step is the focal point of the theme development, where the suspect is presented with two alternate justifications for committing the offence, with one being more attractive than the other. For example, "Did you blow that money on booze, drugs, and women and party with it, or did you need it to help out your family?" (Inbau et al., 2001: p. 353).

The tactics used in the Reid technique are likened to a form of attitude-change process (Memon, Vrij, & Bull, 2003), whereby the perceived advantages and disadvantages to the suspect are altered by the processes of isolation, confrontation, and minimization. At the same time, the main rationale supporting the use of the Reid technique in interrogation training and practice relates back to the psychological myth that individuals will not confess to committing a crime they did not commit (Hartwig, Granhag, & Vrij, 2005).

Not only can problematic interrogation tactics lead to the elicitation of a false confession, but it can also result in errors made by police, which include misclassification, coercion, and contamination (Leo, 2009). Misclassification occurs at the initial stages of the investigative process when the police decide to interrogate a suspect, relying solely on the investigators' detection of truth.²⁶ A misclassification error can be brought on by poor police training in conjunction with an over reliance on the interrogator's determination of the truth.²⁷ This is problematic as studies have shown that people are highly prone to committing errors in the truth detection process due to the difficulty in detecting deception and lying (Kassin, 2008; Leo, 2009).²⁸ Errors in lie detection are problematic as, "...once specific suspects are targeted, police interviews and interrogations are thereafter guided by the presumption of guilt" (Davis & Leo, 2006: p.14). The error of coercion can also occur, wherein promises of inducements or threats

²⁴ After having accepted the alternative questions, "Step 8 involves having the suspect orally relate the various details about the offence that will serve ultimately to establish legal guilt" (Inbau et al., 1986: p.80-81).

²⁵ "Step 9 relates to the confession itself. This step involves the recommended procedure for converting an oral confession into a written one" (p.81). It is essential that the oral confession is converted into a written one as soon as possible in order to minimize the risk of contradictions.

²⁶ The initial interview in the Reid technique serves this purpose of detecting "truth", a determination that guides the subsequent interrogation (Hartwig et al., 2005: p. 386).

²⁷ Police officers are taught to examine the suspect for numerous verbal and non-verbal cues, including avoidance of eye contact, slouching, chewing of fingernails, being uncooperative, guarded, and offering broad denials, which are alleged to indicate whether the suspect is being deceptive or telling the truth (Leo, 2009).

²⁸ It has been show that people are efficient lie detectors approximately 50% of the time, meaning that it is essentially left to chance whether an interrogator can detect a lie (Leo, 2009).

are used to influence the psychological state of the suspect (Leo, 2009). The third error that interrogators can make is the contamination error, which occurs when information regarding the crime scene or nature of the offence is divulged to the suspect throughout the interrogation process, directly influencing the post-admission narrative (Leo, 2009). A confession that contains contaminated information supplied by interrogators, along with errors of coercion and misclassification, is likely to be a false, if not at least an extremely unreliable, confession.

Furthermore, suspects can possess certain traits that render them more susceptible to providing a false confession. The individuals who possess these vulnerabilities are more often the intellectually disabled, youth, and mentally ill persons (Drizen & Leo, 2004; Kassin, 2008; Leo, 2009). According to Drizen and Leo (2004), intellectually disabled people are more susceptible to providing a false confession for a variety of reasons, including low functioning intelligence, short attention span, poor memory, and below average conceptual and communication skills. As a result, it is more likely that individuals with these traits will not completely understand statements or questions that are posed to them, or the impact of answers and statements they provide to interrogators. Moreover, people with an intellectual disability are often eager to please, which contributes to a willingness to comply to the demands of others, especially to those in a position of authority (Ellis & Luckasson, 1985; Leo, 2009). The readiness to comply with demands is compounded by being easily overwhelmed by stress (Leo, 2009), making the pressures of the interrogation overwhelming for intellectually disabled persons.

Owen-Kostelnik, Reppucci, and Meyer (2006) maintain that youth possess many of the same qualities, such as an inability to fully comprehend the ramifications of an interrogation, trust in authority figures, an eagerness to please, and high suggestibility. Additionally, Kassin (2008) states that youth exhibit an “immaturity of judgment” (p.251) in their decision-making

process, which is directed by impulsivity with a focus on instant gratification (ending the interrogation) and a decreased ability to perceive and comprehend future consequences.²⁹ People who suffer from mental illness are also more vulnerable to acquiescing to the pressures of an interrogation (Leo, 2009; Redlich, 2004). Mentally ill people can possess a wide range of psychological symptoms that make them more likely to make self-incriminating statements in response to the strain of an interrogation. These factors include:

“...faulty reality monitoring, distorted perceptions and beliefs, an inability to distinguish fact from fantasy, proneness to feelings of guilt, heightened anxiety, mood disturbances, and a lack of self-control. In addition, the mentally ill may suffer from deficits in executive functioning, attention, and memory; become easily confused; and lack social skills such as assertiveness” (Leo, 2009: p. 336).

These qualities render a mentally ill person at risk for providing a false confession of the voluntary, pressured-compliant and pressured-internalized type, due to being highly susceptible to pressures existent in an interrogation, pressures that may not be coercive to non-mentally ill individuals (Salas, 2004). Therefore, the mentally ill, youth, and the intellectually disabled can possess various individual traits that render them vulnerable to providing self-incriminating statements during an interrogation.

The Significance of Confession Evidence

Once a confession, true or false, has been elicited it engenders very serious consequences for the suspect, due to the substantial weight that is attributed to confession evidence by the trier of fact. In comparison to other forms of evidence, confession evidence is the most “incriminating and persuasive evidence of guilt that a state can bring against a defendant” (Leo, 2009: p. 340). Similarly, confession evidence becomes a powerful piece of evidence throughout various levels of the criminal justice system, starting at the investigative stage. Once interrogators obtain a

²⁹ This pattern of behaviour is evident in the case of the Central Park Five, discussed on page 10.

confession, the police will effectively close the investigation and eliminate any inquiry into evidence that contradicts the suspects culpability, such as an alibi or information about an alternate suspect (Drizen & Leo, 2004; Leo, 2009; Leo & Ofshe, 1998). Once a confession is procured and the suspect has been charged, the media and the public assume the suspect is guilty (Leo, 2009). This presumption of guilt is conveyed throughout the trial phase and can be adopted by the prosecution, defence, jurors, and the judiciary (Drizen & Leo, 2004; Leo, 2009; Leo & Ofshe, 1998).

As an actor of the state, a prosecutor's aim is to obtain a conviction against the accused. However, when confession evidence is involved the pursuit of the conviction may be different as prosecutors will typically aim to charge the accused with the highest number, and types, of offences (Cassell & Hayman, 1996). Likewise, bail is typically set at a higher amount when confession evidence is present (Walker, 1998). Furthermore, when confession evidence is available, it becomes the centerpiece of the prosecution's case against the defendant at trial (Drizen & Leo, 2004; Leo, 2009; Leo & Ofshe, 1998). The reliance on confession evidence can create a presumption of guilt so strong that in cases where there is DNA or other forms of evidence establishing the defendant's innocence, prosecutors have been seen to continue to believe in the validity of the confession obtained, denying that it could be false (Leo, 2009; Medwed, 2004). Furthermore, defence attorneys can also demonstrate this bias when confession evidence is involved, as it has been shown that when defence attorneys represent people who have provided a confession, they often encourage the use of a plea bargain in order to take a lesser charge rather than face a stiffer penalty by going to trial (Leo, 2009).

At the same time, the most significant impact that confession evidence can have is on the trier of fact, more specifically the jury. Juries place substantial weight on confession evidence, as

they find that it is more indicative of the defendant's guilt in comparison to other forms of evidence (Leo & Ofshe, 1998). This is problematic since a common perception amongst jurors is that a false confession is "contrary to common sense, irrational and self-destructive" (Leo, 2009: p.485). Jurors who are ignorant to the causes of false confessions deem it to be unfathomable that an individual would falsely confess to a crime they did not commit. Consequently, when confession evidence is present in a case that is being tried by a judge and jury it is nearly certain that a conviction will be secured. This has been reinforced by the California Supreme Court, whereby Justice Tobriner, J. states that a, "confession operates as a kind of evidentiary bombshell which shatters the defence" (as found in Leo, 2009: p. 341).

The judiciary can also be influenced by confession evidence, even though they are meant to be unbiased and aware of the risk factors that can cause a suspect to falsely confess. Leo (2009) finds that the judiciary have been seen to possess a presumption of guilt, as they seldom determine confession evidence to be inadmissible and are habituated to doubt a defendant's claims of innocence or the possibility of police misconduct when confession evidence is involved. This is also evident in the sentencing stage of the trial when a defendant claims that their confession is false, as:

"...trial judges are conditioned to punish defendants for claiming innocence (the logical extension of not accepting the prosecutor's plea bargain and sparing the State the expense of a jury trial) and for failing to express remorse or apologize for his wrongdoings" (Drizen & Leo, 2004: p.921).

Clearly, the introduction of confession evidence carries significant weight in convicting and sentencing an accused. Once a false confession is given, a chain reaction occurs that conveys a presumption of guilt throughout the numerous levels and actors of the criminal justice system, which can hinder the objective administration of justice.

Undercover Operations and Unreliable Confessions: The “Mr. Big” Sting

While it is evident that there are a number of factors that cause a suspect to falsely confess to something they did not do, the research concerning the causes of false confessions is focused primarily on when such confessions occur within a custodial setting. However, the factors that cause false confessions in a custodial setting also occur in extra-custodial interrogations, specifically the RCMP undercover operation the “Mr. Big” sting. As discussed in the introduction, this operation is undertaken when the RCMP suspects that an individual is guilty of committing a serious crime. During the operation, officers will befriend the targeted individual, and offer a partial position of ‘employment’ within the criminal organization, to which the suspect earns financial payouts. The officers also enact various scenarios of violence throughout the operation in order to illustrate the organization’s acceptance of violence. These tactics embody similar forms of pressure to the interrogative techniques used in custodial settings that have been proven to produce unreliable confessions. In such cases, the suspect is presented with both financial and social inducements, is subjected to coercive tactics that espouse violence, intimidation, and psychological manipulation. These techniques exert significant psychological and emotional control over the suspect that produces, in some cases, an overwhelming motivation to confess, combined with practically non-existent drawbacks when the suspect is faced with the opportunity to admit guilt to “Mr. Big” (Poloz, 2015). In an examination of four cases where a “Mr. Big” operation procured a confession, Nowlin (2004) concluded that the RCMP undercover operation has a tendency to “produce unreliable, and at times, patently false, confessions” (p. 394).

Inducements

Financial and social inducements are the two main types of inducements offered to suspects throughout the undercover operation. A suspect is typically offered a financially enticing position in the fictitious criminal organization, which often entails a raise in salary along with the promise of steady work (Keenan & Brockman, 2010). The steady work requires very little effort, in exchange for substantial payment (Keenan & Brockman, 2010; Moore et al., 2009; Poloz, 2015). This is evident in the case of Clayton George Mentuck, as Mentuck was paid \$1800 for a week's worth of work that took him a total of 20 hours to complete.³⁰ Another tactic aimed at inducing the suspect occurs when the undercover operatives demonstrate the wealth attached the organization, which is typically done by counting large sums of money in front of the suspect (Keenan & Brockman, 2010; Moore et al. 2009; Smith et al., 2009). In fact, Clayton George Mentuck was regularly asked to count large sums of money totaling \$20,000-\$50,000, with undercover officers repeatedly indicating that those amounts of money were “chump change” in comparison to what Mentuck would make as a full-time member of the organization.³¹

Offers of a steady and substantial income can be very influential given that the majority of targets of the undercover operation are marginalized individuals who are “on the fringes of society” (Keenan & Brockman, 2010: p. 78). Prior to a “Mr. Big” sting, those targeted typically experience financial vulnerability, sometimes due to being investigated for a serious offence (Khoday, 2013). Few employers will hire or retain the services of individuals investigated for serious crimes, leaving them with limited economic opportunities (Khoday, 2013). For instance, Kyle Unger was unable to earn an income after being investigated for murder due to the

³⁰ *Mentuck supra* note 1 at para. 76.

³¹ *Ibid* at para. 77

reluctance of many community members to hire a suspected murderer.³² The suspect's dire financial situation prior to the sting renders the financial inducements offered during the undercover operation more appealing and powerful.

Social inducements can also have a significant influence over a suspect who is considering to confess to “Mr. Big”. Full-time membership in the criminal organization entails becoming a member of a tight-knit social network (Khoday, 2013; Moore et al, 2009). Membership within this social network allows the suspect to form friendships that are based on the values adhered to by the organization, which are trust, loyalty and integrity (Keenan & Brockman, 2010; Khoday, 2013). The allure of belonging to this social network is amplified, as suspects are typically subjected to social exclusion and isolation from their community due to the stigma attached to being investigated for a serious offence prior to the undercover operation (Khoday, 2013).

The psychological influence that financial and social inducements can have on a suspect is evident in the case of Nelson Hart. Hart was lured into the fake criminal organization by several offers of work³³, for which he earned a total of \$16,000 over a relatively short period of time.³⁴ Hart was also promised a future payout of \$25,000 for an upcoming job.³⁵ Throughout the operation, Hart was also treated to ‘business’ trips across Canada where he dined at expensive restaurants and stayed at the most luxurious hotels with the undercover officers.³⁶ This was particularly enticing to Hart since he was receiving social assistance and was identified by the undercover officers as a socially isolated individual who had no friends.³⁷ The lavish trips and

³² *Unger v. Canada (Minister of Justice)*, [2005] MBQB 238 [*Unger I*] at para. 17.

³³ These tasks included the delivery of fake credit cards, casino chips, and forged passports (*R v. Hart*, [2012] N.J. No. 303 (C.A.) [*Hart 2012*] at para. 6)

³⁴ *Ibid* at para. 6

³⁵ *Ibid* at para. 6

³⁶ *Ibid* at para. 6

³⁷ *Ibid* at para.7.

nights spent with the operatives created a social bond³⁸ so strong that Hart “came to view the undercover officers as more than family, telling them he loved them more than brothers”.³⁹ Consequently, when confronted by “Mr. Big”, Hart did not want to lose his only close friends and his improved income, and confessed to a crime that he did not commit. In the end, Hart’s perception of his social bond with the operatives was so strong that his first call from prison was to an undercover officer he had perceived to be his best friend.⁴⁰

Essentially, being involved in the operation allows the targeted person to develop an improved social and financial status, in an attempt to alter the suspect’s overall behaviour and to exploit their vulnerabilities⁴¹ (Moore et al., 2009; Poloz, 2015). In combination, these inducements serve as a persuasive mechanism in the decision-making process of an individual who is contemplating admitting guilt to “Mr. Big”. Further, the influence of these inducements greatly affects the reliability and voluntariness of a confession obtained under these circumstances.

Coercive Tactics: Culture of Violence, Intimidation, and Pressure

The main coercive tactic used in a “Mr. Big” operation involves establishing the inherently violent capabilities of the organization (Keenan & Brockman, 2010; Moore et al., 2009). Exemplifying a culture of violence is a technique that aims to instill fear in the suspect, as one undercover officer explained, the staged violent scenarios are intended to show the suspect “...that the criminal organization would resort to deadly force to deal with persons who betrayed

³⁸ The social bond was further strengthened as Hart’s wife was also befriended by undercover officers posing as the girlfriends of members of the criminal organization (para. 202).

³⁹ *Ibid* at para. 7.

⁴⁰ *Hart supra* note 5 at para. 37.

⁴¹ For example, in *R v. Cretney*, [1999] B.C.J. No. 2875 (S.C.) undercover operatives discovered that Cretney was a recovering alcoholic, so they provided him with a \$1500 allowance for liquor (para. 8).

it”.⁴² Undercover officers use various techniques to illustrate this, with the most common being staged acts of violence. For instance in *R v. Hathway* [2007]⁴³, Hathaway witnessed a violent act whereby a female accomplice of the organization appeared to be brutally beaten and thrown into a trunk of a car, along with additional death threats being made to her spouse and young child.⁴⁴ This scenario, among numerous others like it, is conducted to demonstrate the violent consequences of defying the organization, which serves as a coercive mechanism when the suspect is prompted to comply with “Mr. Big” who is seeking a confession.

Coercion is also present throughout the operation in the form of explicit pressure placed on the suspect by undercover officers (Khoday, 2013). The most prevalent form of pressure is the reluctance of “Mr. Big”, along with other operatives, to accept a denial from a suspect who maintains that they did not commit the offence under investigation.⁴⁵ For example, Andrew Rose offered 6 denials when pressured to confess to “Mr. Big” who insisted that if Rose told the truth the organization could properly assist him in winning in an impending trial (Burke, 2009). Clayton George Mentuck denied committing the offence under investigation more than a dozen times to undercover officers. Mentuck was pressured by his closest friend in the organization to confess in an attempt to protect both of their positions within the criminal organization.⁴⁶ These forms of pressure can enact a “moral strain” on the suspect (Khoday, 2013), as the suspect does not want to lose the social bonds established with undercover officers and does not want to suffer, or have their confidantes suffer, any violent repercussions. Clearly, a suspect of this

⁴² *R v. O.N.E.*, [2000] B.C.J. No. 1922 (S.C.) at para. 37.

⁴³ *R v. Hathway*, [2007] S.J. No. 245 (Q.B.)

⁴⁴ *Ibid* at para. 19.

⁴⁵ This resembles steps 3 and 4 of the Reid Technique, handling denials and overcoming objections.

⁴⁶ The undercover officer applied pressure by stating that he would lose his job in the organization, since he had vouched for Mentuck to join the organization (*Mentuck supra* note 1 at para. 82.)

operation could be compelled to confess to “Mr. Big” in response to tactics that espouse pressure, intimidation, and violence, coercive tactics that are prohibited in the custodial setting.

Psychologically Manipulative Techniques

Psychologically manipulative techniques used in the meeting with “Mr. Big” also affect the reliability of confessions obtained during the undercover operation. One technique involves “Mr. Big” divulging false information from a corrupt police officer who acts as an informant for the organization⁴⁷ (Keenan & Brockman, 2010; Moore et al., 2009; Poloz, 2015). The information from the alleged “mole” signifies that there was an ongoing investigation regarding the suspect’s involvement in the previously investigated offence (Keenan & Brockman, 2010; Moore et al., 2009). The information will usually take the form of a falsified police memo that displays so-called official police evidence that will lead to the suspect’s arrest (Keenan & Brockman, 2010). In these cases, “Mr. Big” presents this as a major problem for the criminal organization and offers to have the police informant manipulate or destroy the evidence in exchange for the suspect divulging all pertinent information relating to the offence (Keenan & Brockman, 2010; Moore et al., 2009). This is similar to the confrontation method used in the Reid Technique whereby interrogators present false evidence that adversely affects the suspect’s perception of the situation.

Another psychologically manipulative technique that is used by “Mr. Big” is the proposition of a fall guy. In this technique, the criminal organization conveys that it has received information from a corrupt police informant that signifies an ongoing investigation of the suspect, in which an arrest is looming. However, the criminal organization then expresses that it

⁴⁷ This tactic was present in 18 of 81 cases examined by Keenan and Brockman (2010, p. 59).

is owed a debt by an individual, who is already in prison or is suffering from a terminal illness and is willing to admit to committing the offence⁴⁸ (Keenan & Brockman, 2010; Smith et al., 2009). In order to make the story believable, “Mr. Big” will request that the suspect provide the details of how the offence was carried out⁴⁹ (Keenan & Brockman, 2010). These techniques serve to psychologically manipulate the suspect, leading him or her to believe that they will be arrested and convicted if they do not provide incriminating statements to “Mr. Big”. These statements are not statements made against the suspects’ penal interest, but instead are an effort to comply with the demands of the criminal organization in order to make their criminal problems disappear (Nowlin, 2004).

The Significance of “Mr. Big” Sting Confession Evidence

As previously discussed, confession evidence is attributed substantial weight by triers of fact. The significance placed on a “Mr. Big” confession is not only problematic due to reliability issues, but also due to the lack of supporting evidence, as the RCMP deploys this operation only when there is no significant, or any, type of evidence against the accused (Smith et al., 2009). The confession is particularly convincing to jurors, since the meeting with “Mr. Big” is usually caught on videotape, which shows the confession, the details of the offence (true or not), and other instances of bragging about previous criminal activity (Moore et al., 2009). For the most part, jurors are not privy to the forms of coercion and inducements that occur throughout the operation. However, a jury is privy to the bad character evidence that is generated by the

⁴⁸ This tactic was present in 18 of 81 cases examined by Keenan and Brockman (2010, p. 60).

⁴⁹ Also, “Mr. Big” will occasionally offer the suspect a deal for financial compensation under the guise of a wrongful detainment and investigation suit regarding to the investigation that occurred prior to the undercover operation (Smith et al., 2009). For example, George Mentuck was offered legal services in order to sue the attorney general for wrongful arrest and detention. Mentuck was promised 10% of the settlement winnings, or a minimum of \$ 85,000 (*Mentuck supra* note 1, at para. 90).

accused's willingness to join a criminal organization and participate in criminal activity. In addition, officers testify that these operations are designed to elicit true confessions⁵⁰, which can adversely influence a jury (Moore et al., 2009). As a result, confessions procured by this operation typically produce a conviction, as the RCMP boasts a 95% conviction rate⁵¹ (Moore et al., 2009; Poloz, 2015; Smith et al., 2009).

“Unreliable, and at times, Patently False, Confessions”

While the extent to which “Mr. Big” confessions produce wrongful convictions is unknown, there are numerous cases where the undercover operation has produced false and unreliable confessions. After being imprisoned for almost 14 years Kyle Unger was acquitted following a successful application for a ministerial review, when a Manitoba judge found that “very serious concerns” of a wrongful conviction⁵² took place due to unreliable confession evidence and the discovery of new DNA evidence. In addition, other cases such as *Mentuck*, *R v. Evans* [1996]⁵³, *R v. Creek* [1998]⁵⁴, *R v. Ciancio* [2006]⁵⁵ have had charges dropped, the confession excluded as evidence, or an acquittal granted based on the unreliable and coercive nature of the confession evidence. Indeed, while an official wrongful conviction has not been recorded to date as a result of the presence of a confession induced through a “Mr. Big” sting, nonetheless, “the mere absence of a wrongful conviction does not diminish the risk that “Mr.

⁵⁰ This is based on the main principle of the organization, which is honesty. Officers will argue that since honesty is repeatedly promoted within the organization, resulting confessions must be rooted in honesty. Proponents of the operation argue that this strengthens the reliability and credibility of a confession (Moore et al., 2009).

⁵¹ Keenan and Brockman (2010) contend that the conviction rate is closer to 88%; while Puddister and Riddell (2012) report a conviction rate of 91.5%.

⁵² *Unger I*, *supra* note 32 at para. 51

⁵³ *R v. Evans*, [1996] B.C.J. No. 3141 (S.C.)

⁵⁴ *R v. Creek*, [1998] B.C.J. No.3189 (S.C.)

⁵⁵ *R v. Ciancio*, [2006] B.C.J. No. 2926

Big” operations present to the manufacturing of unreliable confessions and prejudicial evidence” (Poloz, 2015: p. 237).

Conclusion

It is clear that a suspect’s choice to offer a confession in this extra-custodial setting can be influenced by manipulative and coercive tactics. The pressures faced by a suspect in a “Mr. Big” sting can be likened to the various interrogation techniques used in custodial interrogations that have been proven to increase the likelihood of a suspect falsely confessing. In Canada, there are numerous common law rules in place to protect the rights of a suspect who is subjected to an interrogation to ensure confessions meet the standards of reliability and voluntariness. However, these legal safeguards only apply to interrogations that take place in custodial settings, which has left suspects targeted by a “Mr. Big” operation vulnerable and unprotected from the pressures present in these extra-custodial type interrogations.

CHAPTER 2

**From Exclusion to a New Common Law Rule of Evidence:
A Review of the Case Law Regarding “Mr. Big” Sting Confessions**

Introduction

Police interrogation techniques play a large role in influencing the production of false confessions in custodial settings. Given the coercive and influential nature of these tactics, multiple rules and regulations have been established through case law to protect individuals who are subjected to police interrogations. These include the common law confessions rule and the constitutional right to silence, which is protected by section 7. of the *Canadian Charter of Rights and Freedoms*.⁵⁶ These protections are in place to ensure that confession evidence obtained by the state is both reliable and voluntary. In spite of the fact that a “Mr. Big” sting does not occur in a custodial setting, defence counsel have frequently challenged the voluntariness and reliability of this type of confession evidence since the inception of the RCMP operation in the early 1990s, and for the most part, they have been unsuccessful in this regard (Keenan & Brockman, 2010; Moore et al., 2009). The following discussion will review the common law parameters that aim to protect an accused from the admission of unreliable and involuntary confessions obtained in a custodial setting into evidence, and outline how these legal regulations have been deemed inapplicable to confession evidence obtained from a “Mr. Big” sting. The chapter will conclude by highlighting the new admissibility test developed in *Hart*, which assesses issues of reliability, prejudicial effect, and police misconduct in confession evidence produced in an extra-custodial setting.

The Common Law Confessions Rule

Dating back to the 18th century, when Canada was still a part of the British Empire, legal scholars have noted that situations occurred where innocent people confessed to crimes they did

⁵⁶ *Canadian Charter of Rights and Freedoms*, Part I of The Constitution Act, 1982, Enacted as Schedule B to the Canada Act 1982, (U.K.) 1982, c. 11. [*Charter*]

not commit (Smith et al., 2009). These false confessions were a result of coercive and extreme methods used by police interrogators, which are known as ‘third degree’ tactics (Drizen & Leo, 2004; Gudjonsson, 2003; Kassin & Wrightsman, 1985; Smith et al., 2009). In the early part of the 20th century, police would rely on tactics that espoused the use of physical pain and psychological torment in order to obtain a confession. These techniques ranged from the use of physical violence in the form of beating, punching or kicking the suspect, to more extreme forms of physical torture, which included the ‘sweat box’⁵⁷, ‘water cure’⁵⁸, suffocation, along with food and sleep deprivation (Drizen & Leo, 2004). Currently, the police are barred from using such extreme tactics as the courts came to realize that an individual is likely to confess to a crime for the sole purpose of escaping the physically and mentally threatening situation.

It was early in the 20th century that Canadian courts addressed this issue by following the UK decision in *Ibrahim v. the King* [1914].⁵⁹ Presiding over the case Lord Sumners stated that,

“[N]o statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority”.⁶⁰

The Supreme Court of Canada adopted this voluntariness rule in *Prosko v. The King* in 1922⁶¹, and later applied it in *R v. Boudreau* [1949]⁶² and *R v. Fitton* [1956].⁶³ These early decisions laid

⁵⁷ The sweat box technique involved putting a suspect in a small, dark cell next to a stove that would produce sweltering heat and repulsive odors (Leo, 1994, as cited in Drizen and Leo, 2004).

⁵⁸ The water cure involved several techniques including: holding a suspect’s head under water to the point where the suspect almost drowned, placing a water hose into the suspects mouth, or forcing a suspect to lay on his back while pouring water up his nose (Leo, 1994, as cited in Drizen and Leo, 2004).

⁵⁹ *Ibrahim v. The King*, [1914] A.C. 599 [*Ibrahim*]

⁶⁰ *Ibid* at para. 609.

⁶¹ *Prosko v. The King* [1922], 63 S.C.R. 226

⁶² *R v. Boudreau*, [1949] S.C.R. 262

⁶³ *R v. Fitton*, [1956] S.C.R. 958

the foundation for a confessions rule to be followed in Canada, where confessions that were obtained with the use of threats and promises by a person of authority would be deemed inadmissible. In the wake of establishing the common law confessions rule, the Supreme Court of Canada has revisited different aspects of the rule more recently, starting with *R v. Rothman* [1981].⁶⁴

In *Rothman*, the accused was charged with marijuana possession. After his arrest and subsequent police warning, the accused refused to provide a statement to police. Directly after this refusal, Rothman was placed in a holding cell with an undercover police officer, at which point he provided a confession. The main issue was the admissibility of the confession evidence and whether it had been made to a person in authority. The judge ruled in a *voir dire*⁶⁵ that the undercover police officer was in fact a person in authority and deemed the confession to be improperly elicited and therefore inadmissible.⁶⁶ However, the Ontario Court of Appeal disagreed with this decision and ordered a new trial.⁶⁷ On appeal to the Supreme Court of Canada it was decided that Rothman did not believe that the undercover officer was a person in authority, signifying that the confession was admissible without any requirement from the Crown

⁶⁴ *R v. Rothman*, [1981] 1 S.C.R. 640 [*Rothman*]

⁶⁵ A *voir dire* is referred to as a “trial within a trial”, and describes a procedure which takes place to determine the admissibility of certain evidence. In the case of a jury trial, the determination is made in the absence of the jury (*R v. Brydon*, [1983] B.C.J. No. 1614 at para. 9).

⁶⁶ The *voir dire* was conducted in order to determine whether Constable McKnight (the undercover officer) was a person in authority. Preceding the confession, McKnight was placed in a cell with Rothman under the instruction of the lead investigating officer. McKnight was unarmed and wearing street clothes, and he did not identify himself as a police officer. However, after hearing the evidence of their conversation, in which McKnight stated he was in jail for a traffic ticket, the trial judge ruled McKnight was a person in authority and that the statements were improperly elicited.

⁶⁷ The majority of the Court of Appeal for Ontario felt that Rothman did not consider that the undercover officer was a person in authority. They even went on to state that had Rothman believed he was a person in authority, that the requirements laid out in *Ibrahim* relating to voluntariness had been met. (*Rothman*, *supra* note 64 at page 33)

to establish that it was voluntary⁶⁸, and thus it was an error of law to refuse to consider the confession.⁶⁹ However, in coming to this decision the court provided minimal guidelines for determining the person in authority requirement, and stated that the test was a subjective one left to the trial judge's interpretation.⁷⁰ The rationale for this requirement was later supported in *R v. Hodgson* in 1998.⁷¹

In *Hodgson*, the accused had confessed to committing a sexual assault while the victim's father held him at knife point.⁷² The issue before the court was whether the confession was made voluntarily to a person in authority.⁷³ The Supreme Court of Canada ruled, without a *voir dire*, that the confession was properly admitted since the person holding the knife to Hodgson's throat was not a person in authority, and that this requirement of the confessions rule only applied when a person had control over the arrest, detention, or prosecution of the suspect.⁷⁴ As Justice Cory. J stated "it is the fear of reprisal or hope of leniency that persons in authority may hold out and which is associated with their official status that may render a statement involuntary".⁷⁵ However, it is not adequate that the statement simply be made to an individual who is a person in authority, but rather, it must be the reasonable subjective belief of the confessor which plays the vital role in this requirement.⁷⁶ Thus, the person in authority requirement is predicated on the subjective belief of the suspect, which is assessed by a judge to determine whether or not the suspect believes that the person they are confessing to is a person in authority. It should also be

⁶⁸ Since Rothman did not believe the undercover officer to be a person in authority, the confession was then ruled to have not been made to a person in authority, dismissing the Crown's responsibility to prove voluntariness (*Ibid* at page. 20).

⁶⁹ *Ibid* at page. 20

⁷⁰ *Ibid*

⁷¹ *R v. Hodgson*, [1998] 2 S.C.R. 449 [*Hodgson*]

⁷² *Ibid* at para. 5.

⁷³ The question here was whether the father who held Hodgson at knife point represented a person in authority because of the power he maintained while holding a knife to Hodgson's neck.

⁷⁴ *Ibid* at para 114-115. However, the court did recognize the unfair circumstances of the situation.

⁷⁵ *Ibid* at para. 24

⁷⁶ *Ibid* at para. 34

recognized that in *Hodgson*, Cory J. stated that undercover police officers would not usually be considered to be persons in authority.⁷⁷

Nonetheless, in 2000 in *R v. Oickle*⁷⁸ the Supreme Court of Canada made its first restatement of the confessions rule since the establishment of the *Charter* in 1982 due to a “growing understanding of the problems of false confessions”.⁷⁹ In this case, Richard Oickle underwent a police administered polygraph test as a part of an investigation concerning a string of fires that occurred in his neighborhood.⁸⁰ Oickle was made aware that the interpretation of the polygraph test results were not admissible, but anything that he said would be admissible.⁸¹ Before undergoing the polygraph test, detectives administered a ‘pre-test’ to provide a foundation for the polygraph test questioning. It was during this ‘pre-test’ that Oickle made inculpatory statements.⁸² At trial, the judge held a *voir dire* to determine the admissibility of the confession; it was later admitted, and ultimately lead to a conviction.⁸³ On appeal, the Nova Scotia Court of Appeal found the statements to be involuntary, and therefore inadmissible, acquitting the accused of all charges.⁸⁴ The Supreme Court of Canada was in agreement with the Nova Scotia Court of Appeal, ruling that the statements made by the accused were done out of fear of prejudice or hope of advantage, which lead to the evidence being ruled inadmissible and the conviction dismissed.⁸⁵ Due to the circumstances of this case, the Supreme Court made a comprehensive restatement of the confessions rule in order to combat a growing concern around false confessions and to establish the reliability rationale as the primary basis to measure

⁷⁷ *Ibid* at para. 6

⁷⁸ *R v. Oickle*, [2000] S.C.J No. 38 [*Oickle*]

⁷⁹ *Ibid* at para. 32.

⁸⁰ *Ibid* at para. 4-6

⁸¹ *Ibid* at para. 6

⁸² *Ibid* at para. 7

⁸³ *Ibid* at para. 10

⁸⁴ *Ibid*

⁸⁵ *Ibid* at para. 150-152

confession evidence (Dufraimont, 2008).

In *Oickle* it was restated that voluntariness and reliability are the central factors in determining the admissibility of confession evidence.⁸⁶ At the same time, the court established four basic requirements of the confessions rule that must be met in order for such evidence to be ruled admissible. First is the presence of threats or promises⁸⁷; if a suspect is threatened, or promised advantages by a person in authority, a confession would be considered unreliable.⁸⁸ Secondly, the confession must not be made in oppressive circumstances, which can include conditions that are “distasteful”, that pressure the suspect to confess, and circumstances that overpower the suspect to the point that they begin to doubt their own memory.⁸⁹ The operating mind doctrine is the third requirement of the rule, wherein the suspect must be sufficiently aware of what they are saying and that their statements may be used to their detriment.⁹⁰ The last condition is concerned with the use of police trickery, which is focused on maintaining the integrity of the criminal justice system, and is also concerned with an abuse of process resulting from police misconduct.⁹¹ A community “shock test” is used to determine if an officers conduct would shock the community, and thus, amount to an abuse of process.⁹² Therefore, the common law confessions rule as restated in *Oickle*, in addition to the person of authority requirement, represents the standard that must be met in order for a confession to be deemed reliable and voluntary, and subsequently admitted into evidence.

In *Grandinetti*⁹³ in 2005, the Supreme Court of Canada, for the first time, considered the application of the person in authority requirement in regards to the work of undercover officers

⁸⁶ *Ibid* at para. 47.

⁸⁷ *Ibid* at para. 48-57.

⁸⁸ This requirement has already been followed in Canada, since the adoption of the *Ibrahim* ruling.

⁸⁹ *Ibid* at para. 58.

⁹⁰ *Ibid* at para. 63.

⁹¹ *Ibid* at para. 65.

⁹² *Ibid* at para. 66-67.

⁹³ *R v. Grandinetti*, [2005] 1 S.C.R. 27 [*Grandinetti*]

conducting a “Mr. Big” sting. In this case, an operation was initiated due to a lack of incriminating evidence against the accused in connection with the murder of his wife. While the defence argued that the undercover officers were indeed persons in authority, the trial judge disagreed and ruled that a *voir dire* was not necessary and the confession was admissible.⁹⁴ Grandinetti was subsequently convicted and his appeal was dismissed. Grandinetti’s subjective belief was that the undercover officers were criminals who belonged to a criminal organization and not members of the state. However, the issue on appeal to the Supreme Court of Canada concerned whether the undercover operatives did represent persons in authority due to their statements to the accused regarding associations with corrupt connections in the police force.⁹⁵ In promoting this connection, undercover officers were proposing that they could influence the current investigation of the suspect by way of a corrupt police contact who could alter evidence to steer the investigation away from Grandinetti.⁹⁶ This argument was dismissed by the Supreme Court based on the rationale that Grandinetti’s subjective belief was that he was dealing with criminals who had corrupt police contacts, rather than members of the state who held the coercive power of the state.⁹⁷ With this ruling the Supreme Court of Canada effectively quashed the possibility of rendering confession evidence from a “Mr. Big” operation inadmissible on the grounds of the person in authority requirement of the confessions rule.

According to Moore et al. (2009) the exclusion of “Mr. Big” techniques from the confessions rule was a missed opportunity by the Supreme Court of Canada to protect individuals subjected to the undercover operation from a questionable police tactic that bears the possibility of eliciting a false confession. Surely the suspect does not subjectively believe that the

⁹⁴ *Ibid* at para. 12-15

⁹⁵ *Ibid* at para. 13

⁹⁶ *Ibid* at para. 9-10

⁹⁷ *Ibid* at para. 44

undercover officers are persons in authority, but the exclusion seems to be flawed as the state is still exercising its coercive power and a degree of control over the individual through the use of psychologically manipulative tactics such as a corrupt police contact (Moore et al., 2009).

Defence counsel have also challenged this form of confession evidence on the grounds of the police trickery arm of the confession rule. This requirement of the common law confessions rule was first developed by the Supreme Court of Canada in *Rothman*⁹⁸, and seeks to ensure that a confession is voluntary by examining whether the police used trickery in obtaining a confession.⁹⁹ The rationale supporting this requirement of the confessions rule is outlined by Lamer J. in *Rothman*:

“[T]he 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”.¹⁰⁰

This distinctive feature of the confessions rule is not concerned with whether the confession itself is reliable, but whether the police actions in obtaining the confession were reliable, in the sense of whether the trickery used in procuring the confession would shock the conscience of the community.¹⁰¹ Examples, given by Justice Lamer J. in *Rothman* of police trickery that may shock the community include a police officer pretending to be a chaplain or a legal aid lawyer, or injecting a truth serum into a diabetic under the pretense that it was insulin.¹⁰²

Further, Keenan and Brockman (2010) have demonstrated that defence counsel have also contested the admissibility of “Mr. Big” confession evidence on the grounds that the police

⁹⁸ Later restated in *Oickle*, supra note 78 at para. 65-67

⁹⁹ *Rothman*, supra note 64 at page 44

¹⁰⁰ *Ibid*

¹⁰¹ *Oickle*, supra note 78 at para.65

¹⁰² *Ibid* at para. 66

tactics used would not only shock the conscience of the community, but also amount to an abuse of process in 17 out of 81 cases examined in their study.¹⁰³ The challenges were typically predicated on the basis that tactics, including the use of violence such as staged murders and serious assaults, intimidation, and psychological manipulation amounted to an abuse of process. However, courts at that time did not accept these arguments as no confessions were ruled inadmissible on the basis that the undercover officer's conduct would shock the community.

The police trickery arm of the confessions rule has been criticized, in particular with respect to what exactly constitutes the 'community'. Khoday (2013) asks whether the community is amongst the judiciary or amongst lay-persons, and whether it is a local, provincial, or national community? These questions are especially important in cases involving heinous crimes that have mostly affected a local community. In those scenarios, the local community would be outraged about the crime and would most likely support whatever means necessary for the police to obtain a confession. But, it is important to consider whether a national community, with no personal ties to the victim, their family and friends or the community, would feel the same way (Khoday, 2013). In *R v. Collins*¹⁰⁴, the community was described as a reasonable person in the community, given that the current mood within that community would be reasonable.¹⁰⁵ Again, there is no specific reference to a reasonable person from a local, provincial or national community here. Therefore, problems in assessing what would shock the community begin with the ambiguity of what constitutes the community.

¹⁰³ Keenan and Brockman (2010) conducted an analysis of 81 cases involving "Mr. Big" sting confession evidence, from the inception of the operation in 1992 until 2010.

¹⁰⁴ *R v. Collins*, [1987] S.C.J. No. 15 [*Collins*]

¹⁰⁵ *Ibid* at para. 33

Section 7. Right to Silence

Another parameter that protects individuals from the admission of an involuntary confession into evidence is established by section 7 of the *Charter*, which states, “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”.¹⁰⁶ More specifically, the principles of fundamental justice in section 7 include the right to silence for a detained person, which provides a suspect with the right to remain silent when questioned by police. In *Hebert*¹⁰⁷, the Supreme Court of Canada affirmed that the section 7 right to silence¹⁰⁸ only exists when the suspect is in detention or under control of the state. The Supreme Court also added that once the suspect is detained by the state, the state cannot use any sort of trickery in the attempt of gaining a confession from the detained suspect, as:

“...the scope of the right must extend to exclude tricks which would effectively deprive the suspect of this choice. To permit the authorities to trick the suspect into making a confession to them after he or she has exercised the right of conferring with counsel and declined to make a statement is to permit the authorities to do indirectly what the Charter does not permit them to do directly. This cannot be in accordance with the purpose of the Charter”.¹⁰⁹

In this case, Hebert had been convicted based on self-incriminating statements to an undercover officer in a holding cell, despite previously exercising his right to silence when questioned by detectives in an interrogation.¹¹⁰ Accordingly, the Supreme Court of Canada reversed the Court

¹⁰⁶ *Charter*, *supra* note 56, Legal Rights, section 7.

¹⁰⁷ *R v. Hebert*, [1990] S.C.J. No. 64 [*Hebert*]

¹⁰⁸ This has been a basic tenet of law for generations before the establishment of the Charter (*Ibid* at para 9).

¹⁰⁹ *Ibid* at para. 66.

¹¹⁰ *Ibid* at para. 2

of Appeal decision and restored an acquittal¹¹¹, and established that the section 7. right to silence is a principle of fundamental justice that enables individuals who are subject to detention and control of the state, with the ability to choose not to make statements to police, while also prohibiting the police to use trickery in an attempt to obtain a confession after this right has been exercised.

The application of the right to silence to suspects who are subjected to a “Mr. Big” sting was considered in *R v. McIntyre* [1993]¹¹², as McIntyre was convicted based on a confession to “Mr. Big”. On appeal, the New Brunswick Court of Appeal examined self-incriminating statements made by McIntyre to undercover officers, and whether these statements were protected by the right to silence. Under analysis was the RCMP’s use of an undercover officer to initiate contact with McIntyre while he was in a holding cell after exercising his right to silence during a police interrogation.¹¹³ While in the holding cell, McIntyre did not make any incriminating statements to the undercover officer and was released due to lack of evidence. However, the contact made during this interaction was used to gain information about where McIntyre lived so undercover officers could plan to run into him and subsequently start the undercover operation.¹¹⁴ Five months later during the operation, McIntyre provided the undercover operatives with incriminating statements about his involvement in the murder.¹¹⁵ The New Brunswick Court of Appeal found that the incriminating statements did not violate his constitutional right to silence, ruling that the statements were not made while McIntyre was

¹¹¹ *Ibid* at para. 137

¹¹² *R v. McIntyre*, [1993] N.B.J. No. 293 [*McIntyre I*]

¹¹³ *Ibid* at para. 37.

¹¹⁴ *Ibid*

¹¹⁵ *Ibid*

detained, nor when he was under the control of the state.¹¹⁶ On appeal to the Supreme Court of Canada, Gonthier J. stated that “the accused was not detained within the meaning established in *Hebert*”, and the appeal was subsequently dismissed.¹¹⁷ In addition to the *McIntyre* decision, *R v. Unger* [1993]¹¹⁸, *R v. Moore* [1997]¹¹⁹, and *Grandinetti* have all affirmed that undercover operatives in a “Mr. Big” sting do not breach a suspect’s right to silence since the suspect is not detained by the state and they are technically free to leave the organization at any time. Yet, the inducements and culture of violence used throughout influences how ‘free’ as suspect is to leave the organization.

The same conclusion was reached in *R v. Osmar* at the Ontario Court of Appeal in 2007.¹²⁰ At trial, a significant issue raised by the defence was that the details provided in the “Mr. Big” confession evidence were in fact provided to the accused by the police.¹²¹ This challenge did not prove successful and the accused was convicted. He appealed the conviction on the grounds that his statements to undercover officers should not have been admitted based on police misconduct that violated his section 7 right to silence.¹²² However, the appeal was ultimately dismissed.¹²³ Interestingly, Rosenberg J.A. added that section 7 could protect suspects in situations where the individual, “although not in detention, was nevertheless under the control of the state in circumstances functionally equivalent to detention and equally needing protecting from the greater power”.¹²⁴ Yet, no challenges pertaining to the admissibility of confession evidence procured from a “Mr. Big” operation have been successful on this basis. At the same time, the

¹¹⁶ *Ibid* at para. 54-55

¹¹⁷ *R v. McIntyre*, [1994] 2 S.C.R. 480 [*McIntyre II*] at para. 1

¹¹⁸ *R v. Unger* [1993] M.J. No. 363 (C.A.) [*Unger II*].

¹¹⁹ *R v. Moore*, [1997] B.C.J No. 1569 [*Moore*]

¹²⁰ *R v. Osmar*, [2007] O.J No. 244 [*Osmar*]

¹²¹ *Ibid* at para. 15

¹²² *Ibid* at para. 23

¹²³ *Ibid* at para. 47

¹²⁴ *Ibid* at para. 42.

statement does raise interesting concerns regarding the conditions that an individual will encounter when subjected to this undercover operation. Not only do the excessive financial and social inducements, paired with a culture of violence presented by actors of the state exercise a considerable degree of psychological control over the suspect, but in the meeting with “Mr. Big” the suspect is confined to a room with “Mr. Big” and other members of the criminal organization. These sources of extreme pressure are in fact similar, but not identical, to the pressures and conditions faced by a suspect while in detention. So much so, that the defence in *Moore* argued that the conditions of the meeting with “Mr. Big” were “tantamount to detention” due to the degree of control the undercover officers exerted over Moore.¹²⁵ Regardless of this similarity, however, the conditions faced by a target of this operation are to being detained by the state, the courts have ruled that the “Mr. Big” sting is conducted during the investigatory phase and therefore the suspect is not held in detention under state control.

Bad Character Evidence and the Exclusionary Rule

Bad character evidence is evidence regarding the general character of the accused, including his or her behaviour on different occasions, that can be proffered at trial in an attempt to portray the accused as the type of person who could commit the offence he or she is charged with (Paciocco & Stuesser, 2015). The primary rule of exclusion, which is “one of the most deeply rooted and jealously guarded principles of our criminal law”¹²⁶, protects the accused from being stigmatized by this type of evidence, as it can create prejudice amongst the jury (Paciocco & Stuesser, 2015). The Supreme Court of Canada judgment in *R v. Handy*¹²⁷ outlines the two different kinds of prejudice that accompany bad character evidence. The first is moral prejudice,

¹²⁵ *Moore*, *supra* note 119 at para. 15

¹²⁶ *Maxwell v. D.P.P.*, [1935] A.C. 309 at 317 (H.L.), as cited in Paciocco and Stuesser (2015: p. 56).

¹²⁷ *R v. Handy*, [2002] S.C.J No. 57 [*Handy*]

whereby the jury can be affected by the smearing of the accused's character, which could lead the jury to conclude that the accused is deserving of punishment due to his/her general negative disposition.¹²⁸ Then there is reasoning prejudice, which can cause a jury to be distracted from the offence at hand, shifting their focus and deliberation towards unrelated acts of misconduct by the accused.¹²⁹ Both of these types of prejudice serve to distort the jury's perception of the accused in a negative manner, which creates a "poisonous potential"¹³⁰ on the jury's determination of guilt or innocence.

While the exclusionary rule serves to protect the accused from these forms of prejudice, the use of this exclusionary rule has not yet been exercised to protect an accused who confessed during a "Mr. Big" sting. In fact, it would seem that it has been used to exacerbate negative prejudice against accused persons in these situations. Keenan and Brockman (2010) found that the use of bad character evidence was permitted in 16 of 17 cases in which its admissibility had been challenged. When introducing the evidence, the prosecution will usually proceed to explain the circumstances in which the confession was procured, and the airing of evidence often includes significant bad character evidence. It is not uncommon to have the following types of examples:

"...the accused's willing association with the (fictitious) criminal organization; the notional crimes 'committed' by the accused during the early scenarios; the accused's accession to "Mr. Big's" proposal for dealing with the problem presented by the accused's suspected involvement in the offence under investigation, which may involve an obstruction of justice through the use of corrupt police contacts or having someone else falsely claim responsibility for the offence; and discussion with undercover operatives about other criminal activity, including the target's prior criminal convictions" (Moore et al., 2009: p. 376).

¹²⁸ *Ibid* at para. 139

¹²⁹ *Ibid* at para. 144

¹³⁰ *Ibid* at para. 138

What occurs in these cases is that this prejudicial information is often admitted since its use is justified in terms of situating the context of the operation and explaining the details of the scenarios. Depending on the gravity of the bad character evidence presented, an accused's right to a fair trial could be compromised (Moore, et al., 2009).

Many scholars have called for regulating the admission of this type of evidence from a “Mr. Big” operation. One proposed method would be for the judge to edit the statements made by an accused to undercover officers in order to remove all irrelevant and prejudicial references (Keenan & Brockman, 2010). Another suggestion focused on instructions from judges to juries regarding the nature of the evidence. These warnings are given to a jury when confession evidence is procured by police interrogation techniques involving potentially coercive tactics, and are used to inform jurors the reasons why someone may possibly falsely confess (Smith et al., 2009). However, in *Osmar*, it was determined that the tactics used in a “Mr. Big” operation did not represent coercive interrogation tactics that warranted a cautionary warning from a judge.¹³¹

Evidently, the legal parameters that aim to ensure that confessions admitted into evidence are reliable and voluntary are primarily focused on confessions that are obtained by police in a custodial setting. However, in cases involving confession evidence from a “Mr. Big” sting, the determination of reliability of that evidence was left solely to be considered by the triers of fact (Dufraimont, 2008). This is troubling due to the recognition by the Supreme Court of Canada that the triers of fact struggle with “discounting the weight of confessions; even when obtained in circumstances casting obvious doubt on their reliability” (Poloz, 2015: p.246).

¹³¹ *Osmar supra* note 120 at para 76.

The New Two-Pronged Admissibility Test

The Supreme Court of Canada decision in the case of *Hart* in 2014 changed these parameters. This case involved a murder investigation into the deaths of two four-year-old girls; while their deaths had initially been ruled as accidental, their father Nelson Hart was later charged and convicted of murder in 2007, acquitted on appeal in 2012, which was later affirmed by the Supreme Court in 2014. Nelson Hart had taken his daughters to a park near their home in Gander, Newfoundland, and had returned home in a panic telling his wife that the two girls had fallen into the water.¹³² When an ambulance arrived on the scene, the two girls were pronounced dead, from drowning. As it was determined that Nelson Hart acted “unusually”¹³³ following their deaths, a three-year long investigation took place, which culminated with Hart confessing during a “Mr. Big” sting.¹³⁴ At trial, this confession was the sole piece of evidence used to convict Hart of first-degree murder. Hart appealed his conviction to the Supreme Court of Newfoundland and Labrador Court of Appeal, to which the Court of Appeal allowed the appeal and ordered a new trial.¹³⁵ The Crown then appealed to the Supreme Court of Canada, which found that the tactics used during the undercover operation were coercive and manipulative, and subsequently excluded the evidence and dismissed the appeal.¹³⁶ In coming to this decision, the Supreme Court established a new admissibility test for the specific regulation of confessions obtained through undercover police operations.

The two-pronged approach established a new common law rule of evidence, and outlined a

¹³² *Hart supra* note 5 at para. 16-17

¹³³ *Ibid* at para. 19

¹³⁴ For the specific details of this operation see page 20

¹³⁵ *Hart supra* note 5 at para. 46

¹³⁶ *Ibid* at para. 243

modified conception of the doctrine of abuse of process that addresses police misconduct.¹³⁷ The first prong specifically assessed the admissibility of confessions obtained by the undercover operation:

“[W]here the state recruits an accused into a fictitious criminal organization of its own making and seeks to elicit a confession from him, any confession made by the accused to the state during the operation should be treated as presumptively inadmissible”.¹³⁸

The responsibility of establishing the confession as admissible falls on the Crown during a *voir dire* at trial. In order to establish the evidence as admissible, the Crown must establish that the probative value of the confession outweighs its prejudicial effect.¹³⁹ In essence, this test espouses a cost-benefit analysis, wherein the value of the evidence is weighed against the perceived costs of admitting it.¹⁴⁰

The probative value of the evidence is centered upon an assessment of reliability. The first step in assessing the reliability of the confession evidence is to examine the circumstances in which the confession was procured.¹⁴¹ The circumstances that will be assessed by the court include:

“...the length of the operation, the number of interactions between the police and the accused, the nature of the relationship between the undercover officers and the accused, the nature and extent of the inducements offered, the presence of any threats, the conduct of the interrogation itself, and the personality of the accused, including his or her age, sophistication, and mental health”.¹⁴²

In addition to these circumstances the court will examine the confession itself seeking markers of reliability. The assessment of the confession is conducted to determine:

¹³⁷ *Ibid* at para. 84.

¹³⁸ *Ibid* at para. 85.

¹³⁹ *Ibid*

¹⁴⁰ *Ibid* at para. 95.

¹⁴¹ *Ibid* at para. 102.

¹⁴² *Ibid*

“...whether it leads to the discovery of additional evidence, whether it identifies any elements of the crime that had not been made public (e.g., the murder weapon), or whether it accurately describes mundane details of the crime the accused would not likely have known had he not committed it”.¹⁴³

Therefore, the first phase of the cost-benefit analysis is focused on reliability, wherein the probative value of admitting the confession is examined in terms of the circumstances in which the confession was procured and whether there are confirmatory details within the confession.

The second phase of the cost-benefit analysis consists of measuring the ‘cost’ of admitting the evidence. This is done by examining the prejudicial effect, in the form of bad character evidence, that the evidence from the undercover operation will have on trier of fact, more precisely a jury.¹⁴⁴ As discussed, bad character evidence can cause both a moral and reasoning prejudice. In terms of moral prejudice, the jury is presented with evidence that illustrates the accused’s willingness to join a criminal organization, while subsequently committing a number of ‘simulated crimes’ for an organization that the accused believes to be real.¹⁴⁵ This moral prejudice can be enhanced in cases involving simulated crimes of violence, boasting about prior criminal activity, or evidence that illustrates a prior history of violence.¹⁴⁶ Moreover, reasoning prejudice can distract the jury’s focus away from the charge at hand in the trial, which can be influenced by the length of the operation, the amount of time the operation is discussed in court, and any controversy surrounding the occurrence of a conversation or event in the operation.¹⁴⁷

The trial judge must determine that the Crown has met its burden, on a balance of probabilities, that the probative value of the confession garnered from a “Mr. Big” sting outweighs its prejudicial effect in order for such evidence to be admitted. It is acknowledged that

¹⁴³ *Ibid* at para. 105.

¹⁴⁴ *Ibid* at para. 85.

¹⁴⁵ *Ibid* at para. 106

¹⁴⁶ *Ibid*

¹⁴⁷ *Ibid*

the trial judge will direct the majority of their analysis towards the assessment of the probative value of the confession, since the prejudicial effect is a fairly constant variable in cases involving this evidence.¹⁴⁸ If the Crown has met its burden of proving that the probative value of the confession evidence outweighs its prejudicial effect, the focus then shifts towards the defence and the second prong of the admissibility test, which is concerned with the doctrine of an abuse of process.

It was recognized by the Supreme Court of Canada that the doctrine of an abuse of process had done little in the past to protect individuals subjected to this RCMP operation; in fact some judges have described the use of the operation as “skillful police work”.¹⁴⁹ As a result, the Supreme Court outlined that the first step in restoring the doctrine of abuse of process in the context of a “Mr. Big” sting is to inform trial judges that these operations can become abusive and should be examined carefully.¹⁵⁰ However, the Moldaver J. states that it is impossible to impose a “precise formula” for determining when a “Mr. Big” operation becomes abusive¹⁵¹. In absence of a “bright-line rule”¹⁵², the Supreme Court of Canada does acknowledge that officers who are conducting the operation “cannot be permitted to overcome the will of the accused and coerce a confession”.¹⁵³ In assessing whether the will of the accused has been overcome by undercover officers, inducements alone are not deemed problematic, but when paired with threats they can represent coercive police conduct.¹⁵⁴ Furthermore, the use of violence, and

¹⁴⁸ *Hart*, *supra* note 5 at para. 108

¹⁴⁹ *Ibid* at para. 114, in referencing *R v. Fliss*, [2002] 1 S.C.R. 535 at para. 21, where the judge described a “Mr. Big” sting as skillful police work.

¹⁵⁰ *Ibid* at para. 114.

¹⁵¹ *Ibid* at para. 115.

¹⁵² *Ibid*. The SCC stated that since the “Mr. Big” operations tend to vary, there cannot be one clear-cut rule that applies to all operations of this kind.

¹⁵³ *Ibid*

¹⁵⁴ *Ibid*

threats of violence, are forms of coercion that represent police misconduct.¹⁵⁵ Moldaver J. also acknowledged that operations that target the accused's vulnerabilities, such as mental health problems, substance addiction issues and youthfulness, are also problematic.¹⁵⁶ Defence counsel must illustrate that the undercover officer's conduct in the operation crossed the line of skillful police work. By recognizing the doctrine of an abuse of process in the context of a "Mr. Big" sting, the Supreme Court of Canada is seeking to guard against state misconduct that impedes the integrity of the criminal justice system and the fairness of trials.¹⁵⁷

Conclusion

From the inception of this RCMP undercover operation, individuals who have provided a confession have not been protected by the common law parameters regarding confessions, as these legal regulations have focused solely on confessions obtained while in custody. The new two-pronged admissibility test established in *Hart* is directed at non-custodial interrogations involving undercover operations where the state poses as a fictitious criminal organization. By implementing the new two-pronged approach, the Supreme Court of Canada has directly addressed the three main concerns surrounding the undercover operation: reliability, prejudice, and police misconduct.¹⁵⁸ The two-pronged approach addresses these concerns by assessing the evidence directly, while also providing oversight regarding the conduct of the police.¹⁵⁹ Individuals subjected to this operation should be protected against the admission of involuntary and unreliable confessions into evidence, as the admission of such evidence has proven to have serious implications on the determination of guilt or innocence. The admissibility test provides

¹⁵⁵ *Ibid*

¹⁵⁶ *Ibid* at para. 117

¹⁵⁷ *Ibid* at para. 122

¹⁵⁸ *Ibid* at para. 119

¹⁵⁹ *Ibid* at para. 120

protection for an accused person, while also maintaining the RCMPs ability to continue gaining valuable evidence.¹⁶⁰ It will be interesting to see how the main techniques and tactics are modified going forward, and if the use of this questionable undercover operation will be reduced.

¹⁶⁰ *Ibid* at para. 83

CHAPTER 3

Methodological Discussion

Introduction

The goal of this research project initially was to gain the perspectives of criminal justice officials on the use of undercover operations, the development of the two-pronged admissibility test, and their opinions on how this test would affect the use of the “Mr. Big” sting going forward. To achieve this, I had planned on conducting interviews with defence lawyers who have represented accused persons who have confessed during a “Mr. Big” sting, and RCMP officers who have played a role in planning or carrying out the undercover operation. Once this data was collected, I planned to conduct a qualitative content analysis on the interview transcripts. However, as the early stages of the research project were progressing¹⁶¹, the RCMP responded to my request to interview their officers stating that they would not grant me permission to speak with these officers due to concerns of eroding the use of the undercover technique. Consequently, I began to reframe the entire focus of my research project.

Rather than concentrating on the perspectives of criminal justice officials regarding the undercover operation, I shifted my focus to address what sort of impact the new admissibility test developed in *Hart* has had since its implementation. Accordingly, the major research question of this project seeks to address: *What impact has the decision in Hart had on subsequent cases using similar undercover methods?* To assess the impact of the new evidentiary rule, the methodological approach focuses on case decisions that have occurred since *Hart*. The data collection procedure used in this study was a census sampling technique of cases that have applied the new admissibility test. Next, a directed content analysis was undertaken to analyze

¹⁶¹ At this stage, I had already gained approval from the Research Ethics Board (REB) at the University of Ottawa for the overall project, and had gained ethical approval regarding the consent form for participants and the script to send out to individuals who may be interested in participating in the study. The interview questions were also prepared.

the data to produce findings regarding the court's interpretation of the new rule and the influence this interpretation has had. This chapter will explore both the data collection and analysis procedures in more detail, outlining the process undertaken to complete the analysis of cases that have applied the new admissibility test.

Data Collection

The method used to provide a sample of data to be analyzed in this study was census sampling. This method involves sampling all relevant texts, wherein a researcher does not make any choice in deciding what to include or exclude (Krippendorff, 2004). The only choice made in this research study was to implement criteria that cases would have to meet in order to be included in the census sample. The first part was straightforward and required the two-pronged admissibility test developed in *Hart* to have been applied in the case. There were four main types of legal rulings that could have applied the admissibility test, which included:

1. A *voir dire* at trial to determine whether the confession evidence was admissible;
2. A trial decision that contains both the result of the *voir dire* and the verdict of the trial;
3. A Court of Appeal decision that reviews verdicts that occurred before the admissibility test was developed, and then applies the new admissibility test to the confession evidence that was presented at trial;
4. And Supreme Court of Canada decisions.

The second part of the sampling involved determining a cut-off date for cases to be eligible for the census sample, since this type of sampling includes all relevant sources of data. Court decisions included in the census sample in this study took place from immediately after the decision in *Hart* (July 2014) to April 1st, 2016.¹⁶²

¹⁶² The decision for this date was based on the progression of my research project.

LexisNexis Quicklaw¹⁶³ was used to collect all of the cases used in the census sample. In Quick Law, the *Hart* decision was searched using the option of “*Note up with QuickCITE*”.¹⁶⁴ The results of the search produced every case that had cited *Hart*, and further sorted cases that had followed this decision. The cases that followed the *Hart* decision were examined to confirm that they did indeed apply the admissibility test. As a result, the census sample of data consists of 16 cases¹⁶⁵, which are illustrated in *Table 1*. Once the sample was determined, cases were then segmented into different recording units¹⁶⁶, which consisted of the level of court that rendered the decision. Once the sample for the study was determined, the focus then shifted towards conducting the content analysis.

Content Analysis

The basic principles of content analysis state that an analysis of this type should be conducted systematically and objectively in order to make replicable and valid inferences (Holsti, 1969; Krippendorff, 2004; Mayring, 2000; Schreier, 2012; Stone, Dunphy, Smith & Ogilvie, 1966). In this study, the systematic procedures of analyzing the sampled data will take the form of a directed content analysis. According to Hsieh and Shannon (2005), a directed content analysis is a more structured approach than a conventional content analysis method,

¹⁶³ LexisNexis Quicklaw is a legal database that provides written court decisions from all levels, as well as federal and provincial statutes as well as other legal journals and commentary.

¹⁶⁴ *QuickCite* is the case citation source that produces case collections for Quicklaw. Searching the case name or citation using the “Note up” option produces a collection of cases and information including: a history of the searched case, a summary of judicial considerations, all the cases that have cited the case, and commentary referring to the case.

¹⁶⁵ The sample of 16 cases consist of 6 cases at the Court of Appeal level, 6 cases solely involving a *voir dire* to determine the admissibility of the confession, 3 cases that involved the *voir dire* and the trial verdict, and 1 case that was heard by the Supreme Court of Canada. Additionally, within these 16 cases there are two cases that occurred in Quebec. These cases were both available in English on Quick Law, but Quick Law did note that the translation is not an official translation.

¹⁶⁶ These recording units were simply to organize the data for analysis. According to Schreier (2014) a formal criterion is used that is based on the structure of the material under analysis. For this project, the recording units were segmented based on the court each case was heard in, in order to organize specific themes and patterns that occur in each type of court decision.

since the directed approach uses a deductive strategy to develop the coding frame based on previous research and theory before the main analysis is carried out, rather than developing

Table 1.

Case	Level of Court	Date
<i>R. v. Mack</i> , [2014] S.C.J. No. 58	Supreme Court of Canada (CASC)	2014/09/26
<i>R. v. Balbar</i> , [2014] B.C.J. No. 3232	British Columbia Supreme Court (BCSC) (<i>Voir Dire</i> only)	2014/12/03
<i>R. v. Keene</i> , [2014] O.J. No. 6511	Ontario Superior Court of Justice (ONSupCtJus) (<i>Voir Dire</i> only)	2014/12/15
<i>R. v. Hales</i> , [2014] S.J. No. 750	Saskatchewan Court of the Queen's Bench (SKQB) (<i>Voir Dire</i> & Trial Verdict)	2014/12/17
<i>R. v. Mildenerger</i> , [2015] S.J. No. 515	Saskatchewan Court of the Queen's Bench (SKQB) (<i>Voir Dire</i> only)	2015/01/29
<i>R. v. Streiling</i> , [2015] B.C.J. No. 1618	British Columbia Supreme Court (BCSC) (<i>Voir Dire</i> & Trial Verdict)	2015/04/02
<i>Perreault v. R.</i> , [2015] Q.J. No. 3389	Quebec Court of Appeal (QCCA)	2015/04/27
<i>R v. Magoon</i> , [2015] A.J. No. 607	Alberta Court of the Queen's Bench (ABQB) (<i>Voir Dire</i> & Trial Verdict)	2015/06/03
<i>R. v. Tingle</i> , [2015] S.J. No. 348	Saskatchewan Court of the Queen's Bench (SKQB) (<i>Voir Dire</i> only)	2015/06/24
<i>R. v. Allgood</i> , [2015] S.J. No. 387	Saskatchewan Court of Appeal (SKCA)	2015/08/07
<i>R. v. West</i> , [2015] B.C.J. No. 1943	British Columbia Court of Appeal (BCCA)	2015/09/14
<i>Laflamme v. R.</i> , [2015] Q.J. No. 8925	Quebec Court of Appeal (QCCA)	2015/09/21
<i>R. v. Ledesma</i> , [2014] A.J. No. 1468	Alberta Court of Queen's Bench (ABQB) (<i>Voir Dire</i> only)	2015/12/23
<i>R. v. M.M.</i> , [2015] A.J. No. 1289	Alberta Court of the Queen's Bench (ABQB) (<i>Voir Dire</i> only)	2015/10/07
<i>R. v. Johnston</i> , [2016] B.C.J. No. 3	British Columbia Court of Appeal (BCCA)	2016/01/05
<i>R. v. Randle</i> , [2016] B.C.J. No. 526	British Columbia Court of Appeal (BCCA)	2016/03/16

categories inductively during the analysis. A deductive strategy allows the researcher to identify key concepts during the development of the primary categories and initial coding scheme based

on previous research conducted on the phenomenon under analysis (Hsieh & Shannon, 2005; Mayring, 2000; Mayring, 2014; Potter & Levine –Donnerstein, 1999).

Deductive Category Development

The initial category development in this project was guided by two main sources. The primary source was the principles outlined in the new admissibility test developed in *Hart*. As discussed above, the new evidentiary rule contains an assessment of probative value, which addresses issues of reliability surrounding both the circumstances of the confession and the confession itself. The probative value is weighed against the prejudicial effect, or resultant bad character evidence, of admitting the confession. This cost-benefit analysis comprises the first prong of the admissibility test (probative value vs. prejudicial effect), whereby the second part examines whether the actions of the undercover officers represented police misconduct and an abuse of process. These three factors constitute the overarching main categories for the analysis. Moreover, specific aspects within each of these factors were used to develop other categories for analysis, which will be discussed in detail below. These main categories are primarily concerned with the court's interpretation of confession evidence from the "Mr. Big" sting. At the same time, past research also played a vital role in the process of category development. The past research regarding the undercover operation was used to guide category development in terms of the various problems with "Mr. Big" confession evidence as highlighted in Chapter One. Together, these two sources directed the development of the initial main categories¹⁶⁷ used in the coding frame for this analysis.

¹⁶⁷ The main categories in qualitative research are focused on the areas of the data in which the researcher strives to gain more information (Mayring, 2000; Schreier, 2014). As the main focus of this research assesses the influence of

i) *Probative Value: Circumstances Surrounding the Confession*

The first set of main categories is primarily concerned with the reliability of the confession and was developed based on factors considered when the probative value of the confession was assessed. When the courts addressed reliability, the first area examined was the circumstances in which the confession was made, focusing on whether inducements were present throughout the operation. Here, the presence of inducements and whether these inducements overcame the will of the suspect were the two main categories that emerged. Subsequently, three sub-categories were developed which specifically focused on whether the inducements were social, financial, or otherwise, and what the corresponding details of these inducements were (if present).

Another main category based on the circumstances surrounding the confession focused on the presence of violence in the operation scenarios, and whether the violence was determined by the judge to be coercive. The corresponding sub-categories focused on the nature of any scenarios espousing violence or intimidation, which included whether violent acts were committed directly on the suspect, whether staged acts of violence were performed in front of the suspect, and whether there were threats of violence made by the undercover officers towards the suspect.

Assessing whether the operation preyed on the vulnerabilities of the accused was also acknowledged by *Hart* as a significant factor in assessing the reliability of the circumstances in which the confession was made. Thus, in following *Hart*, the sub-categories developed in this

Hart on subsequent case decisions, the admissibility test developed in *Hart* was thus a major contributor to the main category development.

regard were related to this determination and addressed whether the suspect had mental health issues, substance abuse issues, or was a young person.

ii) *Probative Value: Markers of Reliability*

Assessing the probative value of the confession in determining whether or not it was admissible raises questions of reliability within the confession itself, otherwise known as markers of reliability. The determination of whether the confession was reliable was thus a main category, while the sub-categories focused on the different types of markers of reliability including: any details regarding the commission of crime, information that leads to the discovery of additional evidence, details that have not been made available to the public, or whether the confession includes mundane details (of the crime scene or the act itself) that only the true perpetrator would know. Additional sub-categories focus on whether these forms of confirmatory evidence are present and what the subsequent details are if they are present, while also addressing whether the presence of confirmatory evidence overrules any issues surrounding the circumstances in which the confession was made (significant inducements or violence) in the determination of reliability.

iii) *Prejudicial Effect*

The prejudicial effect of the evidence was also a main category for coding, as this effect is weighed against the probative value of admitting a “Mr. Big” confession. Assessing the prejudicial effect includes determining whether or not admitting the evidence would cause a prejudicial effect on the trier of fact, and more specifically how significant this prejudicial effect would be. The details of the prejudicial effect were noted, along with the determination of

whether the prejudicial effect was outweighed by the probative value of admitting the confession.

iv) *Abuse of Process*

The second-prong of the admissibility test also became a main category and included evidence as to whether the actions of undercover officers in the operation equated to an abuse of process. The doctrine of abuse of process in this context is intended to guard against state conduct that society would find unacceptable, and which threatens the integrity of the justice system.¹⁶⁸ Accordingly, the sub-categories focus on whether the state engaged in misconduct when eliciting the confession, and the details of the rationale for this decision.

Coding Frame Development

The development and structuring of both the main and sub-categories for the coding frame satisfied the first step in building the coding frame (Boyatzis, 1998; Mayring, 2014; Schreier, 2012; Schreier, 2014). Once the main categories were developed, I began focusing on finalizing the development of the coding frame. Microsoft Word was used as the tool for developing the coding frame, where the process consisted of making a table for each main category, and subsequent sub-categories, in an effort to organize the coded information from the case decision. An example of one of the tables from the coding frame is illustrated in *Figure 1.*, with the entirety of the final coding frame attached in *Appendix A*. The second step in building the coding frame was to provide a working definition for each of the categories, whereby each category was defined, while examples and coding rules were implemented when deemed necessary. In completing this process, the main principles of defining a category in content analysis were

¹⁶⁸ *Hart supra* note 5 at para. 113

Figure 1.

Probative Value (Reliability): Circumstances in which the Confession was Made
Inducements
1. <u>Financial inducements determined to be significant:</u> • Yes • No a) <u>If Yes, rationale given:</u> b) <u>If No, rationale given:</u>
2. <u>Social inducements determined to be significant:</u> • Yes • No a) <u>If yes, rationale given:</u> b) <u>If No, rationale given:</u>
3. <u>Other inducements determined to be significant:</u> • Yes • No a) <u>If yes, rationale given:</u> b) <u>If no, rationale given:</u>
[SUB] <u>Extent of Financial Inducement Present:</u> [SUB] <u>Financial situation of the suspect:</u> [SUB] <u>Extent of Social Inducement Present:</u> [SUB] <u>Social Composition of the suspect:</u> [SUB] <u>Nature of 'Other' Inducement Present:</u>

followed (Mayring, 2014; Schreier, 2014). The category definitions are attached in *Appendix B*.

The final step in completing the coding frame consisted of revising and expanding the original scheme, which was primarily accomplished by performing a pilot analysis.

The Pilot Analysis

A pilot analysis is an iterative process and an essential step in carrying out any content analysis (Bauer & Gaskell, 2000). In a pilot analysis, the coding frame is applied to the sampled data that will be analyzed in the main analysis, in order for the researcher to recognize and modify any faults in the coding frame before the main analysis is undertaken. The pilot phase consists of three main steps: selecting the material, conducting the pilot analysis, and modifying and evaluating the coding frame (Schreier, 2014).

The material selected for the pilot analysis were two cases from separate recording units¹⁶⁹, for the sake of applying the trial coding to cases that differed. Next, the pilot analysis was conducted, where the coding process used in this study was tested. No computer programming or statistical software was used in the coding process for this study. Rather a more basic approach was taken using Microsoft Word. First, each table (main category) was colour coded in the coding frame with a colour using the highlight option in Microsoft Word. This step was undertaken so that the corresponding material in the cases could be highlighted with the same colour to signify a match with a specific category. Once the case decision was coded, I examined the document and proceeded to copy and paste the coded material that had been highlighted in the decision into the coding frame. When the information was pasted into the coding frame it was referenced with the corresponding paragraph number from the case decision.

The pilot analysis functioned as an effective tool for revising the coding frame as several changes were made to the initial categories and the definitions of those categories. For example, a change was made under the main category of violence to include whether the suspect was

¹⁶⁹ One case was a *voir dire* decision: *R. v. Mildenerger*, [2015] S.J. No. 515 [*Mildenerger*], and the other was a decision from the Saskatchewan Court of Appeal: *R. v. Allgood*, [2015] S.J. No. 387 [*Allgood*].

intimidated at any point during the operation, and whether the intimidation was deemed coercive and significant.¹⁷⁰ An additional modification was made to include a category that referred to the specific outcome regarding the probative value of the confession.

Not only did the pilot analysis play an essential role in revising the coding frame, but it also facilitated the evaluation of the frame, as it became clear that the coding frame needed to be expanded. While completing the pilot analysis it became evident that there were additional categories, not highlighted by deductive category development, that needed to be included in the coding frame in order to provide a well-rounded analysis. For instance, the category of additional legal guidelines was added once it became evident there were additional regulations concerning “Mr. Big” confessions.¹⁷¹ This category, amongst others¹⁷², was added during the trial coding phase to provide a more comprehensive description of the data in this study. The pilot analysis strengthened the coding frame because the use of data-driven categories allows for the coding of important data that would not have been accounted for by the deductive categories in the initial coding frame (Gibbs, 2007; Schreier, 2014). At the same time, the use of data-driven categories alongside concept-driven categories satisfies the aspect of flexibility, a key feature of content analysis where the coding frame is accurately matched to the material being analyzed, a feature not present in quantitative methods (Schreier, 2014).

¹⁷⁰ Other changes that were made included: adding a results category so that the verdict at trial or the decision on appeal is noted alongside the result of whether the confession evidence was deemed admissible; and when signifying the level of court that heard the decision, it became apparent that it was important to also have a code for whether the trial was tried by a judge alone or a judge and a jury.

¹⁷¹ During data collection, I would review every case to ensure that the new admissibility test was applied to that case (see page 53, data collection). In reviewing *R. v. Mack*, [2014] S.C.J. No. 58 [*Mack*], it became apparent that there needed to be a category focused on additional legal safeguards pertaining to “Mr. Big” confession evidence.

¹⁷² Other data-driven codes that were added to the coding frame in the evaluation stage include: were the scenarios audio or video taped, and if so how many scenarios and what types of scenarios were audio or video recorded; and the examination of whether there was evidence obtained aside from the “Mr. Big” confession, and the significance given to that evidence, were main points of emphasis for the judge administering the decision in *Allgood*.

In order to assess the research process, questions of reliability and validity need to be addressed, in both quantitative and qualitative research. While such considerations lend themselves more easily to quantitative research, in qualitative research such notions are still important (Golafshani, 2003). The qualitative research concepts such as credibility, trustworthiness, and dependability are significant for assessing the quality of such research (Lincoln & Guba, 1985; Tracy, 2010). Credibility and trustworthiness can be achieved through practices of thick description and providing concrete detail (Bochner, 2000; Tracy 2010). For this project, the issues of credibility and trustworthiness were met by developing a coding frame that reflected material that was particularly relevant to the research question, and through providing detailed definitions of all the main and sub-categories used in the coding frame. Examples were also provided for some categories to provide a more detailed account of what the category entailed. The evaluation process also strengthened the coding frame as new categories were added and certain definitions were altered after the trial coding process.

Dependability is closely associated with the concept of reliability and consistency used in quantitative research (Seale, 1999). Dependability for this qualitative study was addressed by carrying out a second pilot analysis of the same material two weeks after the first pilot analysis was conducted. After the two rounds of pilot analyses were conducted, the coding frames from each round were compared to one another to verify that the results were consistent. This review revealed that the codes were in fact consistent, ensuring that the categories and the codes in the coding frame were dependable. However, it is important to note that there is a potential for another coder to interpret and code results differently due to subjectivity. The final coding frame is attached in *Appendix A*.

The Main Analysis

With the pilot content analysis complete, the coding frame was finalized and the coding process discussed above was used to analyze all 16 cases from the census sample. Each recording unit was analyzed one after the other, starting with the first case from the Supreme Court of Canada (*Mack*), then cases heard on appeal, then decisions solely focused on admissibility, and finally cases that involved the *voir dire* and trial verdict. After all the cases were analyzed, the coding frames were reviewed in order to draw out patterns or themes from the analysis. The important case outcomes, and the rationale for the decisions in the case, would become important aspects in the findings and discussion chapter. Next, the focus shifted to cross reference all of the coding sheets in order to uncover general patterns across the main categories. The patterns that were determined to be the most relevant to the research question were included as findings from the analysis. With the main analysis complete, inferences were able to be drawn regarding the impact of the new evidentiary rule.

Conclusion

The methods of data collection and analysis were appropriate and efficient procedures for answering the primary research question. The census sampling method of data collection allowed for the collection of all the court decisions that have occurred since the new admissibility test was implemented (2014-2016). However, the source that provided the data, LexisNexis Quicklaw, does have its limitations. It is important to note that Quicklaw only makes written decisions available, which means that the information in the written decisions was purposely selected by the judge to be included in the decision. Thus, information from the case itself not deemed significant by the judge could be left out of the written decision. If the data were official

transcripts, obtaining a more detailed and thorough analysis of the case decisions could have been possible, but this was beyond the means of this research project.¹⁷³ Another weakness that this study present is the relative time since the admissibility test (2014) was instituted, since the evaluation of more cases that have applied the new test could potentially provide a more thorough explanation regarding the impact of the rule. However, the data set used in this study can illustrate the initial impact of the admissibility test to date. In terms of analyzing the sampled data, the directed content analysis has provided a sound systematic process of analysis based on both concept and data-driven categories and codes, that were made more reliable and valid by the pilot analysis.

¹⁷³ Acquiring official transcripts can be very expensive, especially since transcripts were needed for 16 cases.

CHAPTER 4

General Systems Theory

Introduction

In order to situate the findings of the court's interpretation of the new admissibility rule, a model of criminal justice functioning was deemed to be appropriate rather than using a criminological theory, per se. This was considered important given that the study itself is highly practical in nature, which seems more conducive to using a conceptual framework of the functioning and operation of criminal justice for understanding the study's findings. Focusing on criminal justice functioning involves the examination of a range of concepts that include the influence of criminal justice policy, agency behaviour, the relationship between agencies, and the 'why' of practitioner and organizational behaviour (Kraska, 2006). The influence of criminal justice "policy" is addressed in this study by examining the impact of the new evidentiary rule on the organizational behaviour of the courts and the police. General systems theory provides a means to examine the functioning of the criminal justice system, from agency behaviour to practitioner discretion and decision-making and was thus particularly appropriate for this thesis. In order to apply systems theory principles to the criminal justice system, a general overview of general systems theory will first be discussed. Thereafter, systems theory will be examined within the context of the criminal justice system, outlining the two main models of systems analysis applied to this field. Finally, examples of research utilizing the functional systems analysis method to examine criminal justice will be examined. This will be followed by a justification as to why a conceptual framework rather than a theoretical framework is most appropriate for the current study.

General Systems Theory: An Overview

General Systems Theory (GST) was first conceived by Bertalanffy (1968) as a way of understanding the organization of the organisms in his work as a biologist. In developing this

perspective, Bertalanffy (1968) determined that a system is more than simply the sum of its parts, and concluded that a more effective way of understanding these parts was in the context of the whole system. Bertalanffy had initially applied this systematic approach to the field of natural sciences, but upon examining the characteristics within these systems it became evident that the basic concepts within these systems could be applied beyond the physical sciences to the social sciences such as psychology and sociology. The systems approach is used in these fields to gain an understanding of a variety of problems ranging from “the network of reactions in a cell to the dynamics of animal populations to electrical engineering, and to problems of the social sciences” (Bertalanffy, 1975: p.43). In spite of the diversity of its application, the basic principle of general systems theory focuses on the interaction of the different components within the system that occur to maintain the systems’ overall functioning. As Rapoport (1986) stated:

“...a whole which functions as a whole by virtue of the interdependence of its parts is called a system, and the method which aims at discovering how this is brought about in the widest variety of systems has been called general systems theory” (p. xvi).

There are a number of specific concepts and assumptions attached to this perspective, and one important concept is holism, which is found in many definitions concerning the systems perspective (Bertalanffy, 1968). For instance, Kuhn (1971) defines a system as “any situation to which the fallacy of composition could apply—namely, that the whole is something distinct from the sum of its parts” (p.118).¹⁷⁴ Clearly, holism is a central feature of any system, and is concerned with the totality of the system in combination with the interdependency between the system’s parts. As the concept of holism can be universally applied to systems, there are two distinct types of systems, open and closed systems.

¹⁷⁴ Also, see the definition provided by Rapoport (1986) in the above paragraph.

Closed systems typically exist within the natural sciences. The main feature that makes a system closed is that it is isolated from its environment, meaning that all interactions in the system occur between the components of that same system, with few exchanges with the environment (Kuhn, 1974). As a result, closed systems are considered to be autonomous as they do not affect, or are not affected by, other external systems (Bertalanffy, 1968). On the contrary, the components within open systems not only interact with one another, but they also exchange material, information, and energy with the environment (Kast & Rosenzweig, 1972). An open system continuously interacts with its environment receiving information and material, while also outputting material back to external systems.¹⁷⁵ Natural sciences tend to constitute closed systems, whereas social systems are all open systems due to the fact that they are influenced, to some degree, by the environment and other social systems (Catanese and Steiss, 1970). As a result, open systems have system boundaries that may be affected by the influence of other external systems, while closed systems have fixed rigid boundaries (Kast & Rosenzweig, 1972). In order to study a social system, influences from the environment and other social systems must be examined in order to understand the operation of the social system under examination.

The process by which an open system interacts with the material and information from its environment is comprised of three different phases which are defined as: input, throughput¹⁷⁶ and output (Connidis, 1982). According to Katz and Rosenzweig (1972), an open system enacts a transformative process, wherein inputs are received from the environment, which lead the components of the system (subsystems) to transform that input in some way, and subsequently

¹⁷⁵ Kuhn (1974) defines an open system as a “system that receives inputs from or releases outputs to its environment, that is, it is influence by and influences its environment” (p. 28).

¹⁷⁶ Kast & Rosenzweig (1972) refer to this as the input-transformation-output model. The terminology is different from Connidis (1982), but its concept and meaning are the same. The term throughput can also be used interchangeable with processes, as both terms refer to the action of a particular subsystem to transform the input material to an output.

output this transformed material back into the environment. This transformative process can be viewed on a micro-level as each subsystem enacts this process and produces outputs, which then become the inputs for the next subsystem. When transforming the input from the environment, subsystem (A) will influence the information or material input by enacting its throughput or processes and then producing an output, which then becomes subsystem (B) input and is then subject to that subsystems transformative process.¹⁷⁷ This process continues through to the final subsystem, which exports output back to the environment. The level to which a subsystem is reliant on the interaction with another subsystem varies depending on what role that subsystem plays within the total system in comparison to other subsystems.¹⁷⁸ However, each subsystem relies on the actions and outputs of other subsystems, to some capacity, to perform its role within the system. The interdependent functioning between the components of the system throughout the transformative process is vital in regards to the total system functioning, as the operation of the system as a whole is facilitated by the interdependency between the parts of the systems (Rapoport, 1986).

A significant aspect of the interdependent performance in a system occurs through feedback, or the exchange of information between subsystems (Connidis, 1982). As Katz and Rosenzweig (1972) state, feedback occurs when:

“...information concerning the outputs or the process of the system is fed back as an input into the system, perhaps leading to changes in the transformation process and/or future outputs” (p. 450).

¹⁷⁷ In terms of social systems, the unique transformative processes within a subsystem are subject to organizational values, bureaucracy, and objectives of that subsystem.

¹⁷⁸ A subsystem that is highly reliant on interactions with another subsystem will exhibit a high need for interdependency, while a subsystem that is not reliant on other subsystems possesses a higher functional autonomy and lower interdependent need (Connidis, 1982).

Feedback can be both negative and positive: negative feedback allows the system to correct any deviations from its prescribed course, while positive feedback informs the system to maintain the same functions because the prescribed course is being achieved (Kuhn, 1971). Subsystems receive feedback either directly or indirectly. Direct feedback involves communication between subsystems where an exchange of information occurs between the members of the subsystem. Indirect feedback is an evaluation that occurs between subsystems that transpires through one subsystem (A) interpreting and responding to the input it receives, wherein the response acts as feedback, in the form of information for future decision making to the subsystem (B) that supplied the information as an output (Connidis, 1982). Thus, the subsystems that make up the total system are dependent on each other out of necessity, but they also provide various forms of feedback to improve that functionality.

In conjunction with the interdependent nature of the system is the need for functional autonomy within subsystems. While each subsystem operates interdependently with other subsystems, they also possess a degree of functional autonomy when conducting their specific operations. There is an inverse association between interdependence and functional autonomy, meaning that when interdependency is high within a subsystem, its functional autonomy is low. Conversely, if its functional autonomy is high, then the interdependence and reliance on other subsystems will be low (Connidis, 1982). The functional autonomy of a subsystem can vary depending on the specific role that it plays within the total system and what social system is under analysis (Gouldner, 1967). The relationship between the subsystem's pursuit for functional autonomy and its need for interdependence with other subsystems can create conflict, particularly when attempts to maximize functional autonomy simultaneously minimize other

subsystems' functional autonomy. Undoubtedly, functional autonomy and interdependency play a significant role in the functioning of the subsystems, and thus, the total system.

General systems theory can be used as an approach for understanding how a particular system operates and how the components of that system interact. This systems approach is best suited when the phenomena under study shows characteristics of being organized and the research task at hand is partly guided by understanding the nature of the interdependencies within the system (Emery & Trist, 1969). By applying these basic concepts, it is clear that the criminal justice system can be considered an open system based on its interaction with the environment and the interdependent relationship between the different agencies that comprise the total system.

Applying General Systems Theory to the Criminal Justice System: Rational Goal Model and Functional Model Approaches

Quite literally, the criminal justice system is a system made up of a number of subsystems including the police, courts, and corrections. Yet, beyond this literal connotation the principles of a general systems approach have been used to study the criminal justice system, as this perspective can generate insights into the structure and functioning of behaviour of actors within the criminal justice system (Bernard, Paoline, & Pare, 2005). Proponents of this perspective argue that using this approach is valuable for a variety of reasons including the emphasis that is placed on the interdependency between criminal justice subsystems (Cole, 1975; Newman 1975); it can analyze the decision flow throughout the system (Myren, 1976); it provides an in-depth analysis of processes not specific to one part of the CJS (Moore, 1976); and it can highlight competing values within the system (Dawson, 1977).

There are two main approaches used when conducting a systems analysis of the criminal justice system: the rational goal model and the functional-systems model, with the former being the dominant view (Feeley, 1973). The rational goal model focuses on the organizational goals of a subsystem in an effort to improve upon efficiency and effectiveness. Studies that apply the rational goal model approach focus on:

“the formal rules of operation; increasing organizational rationality through more precise specification of actors’ roles to minimize discretion; proposals for new rules; and discrepancies between the formal rules and the actual operation of the justice system” (Connidis, 1982: p. 40).

The main point of emphasis here is that a subsystem’s goals and formal rules are directly linked to efficiency. If the subsystem is accomplishing an organizational goal, it is thus being efficient. For example, the police subsystem can have the goal of controlling crime, using processes such as reactive or preventative policing to try to achieve this goal, and the crime rates can be an outcome that measures whether the goal is being achieved, which ultimately determines effectiveness. Therefore, systems analyses conducted using the rational goal model approach are focused on measuring the effectiveness of its goals, processes, and outcomes, in an effort to improve efficiency within a certain subsystem, which in turn could possibly improve the efficiency of the system as a whole.

Studies that have used the rational goal model approach are typically concerned with policy planning and evaluation research (Connidis, 1982). One example is the JUSSIM model¹⁷⁹, which is an interactive computer program that addressed the flow of units (crimes, arrestees, and cases) through the different components of the criminal justice system, with a specific focus on

¹⁷⁹ Several research projects that discuss the JUSSIM model were reviewed for this project, and none provided a definition of “JUSSIM”. It is assumed to simply be the name of the model and not an acronym that possesses meaning.

the resources used by each subsystem to process these units through the system (Blumstein, 1972). This model used different system inputs¹⁸⁰ and outputs¹⁸¹ to run simulations in order to determine the efficiency of each subsystem, along with what variables that could be added or subtracted to increase effectiveness. The use of mathematical models like this, and others, are useful as they produce simulated changes to the criminal justice system that can potentially become recommendations for actual change within the system.

Maguire, Howard and Newman (1998) also used quantitative measures as a method for constructing an index to measure and compare the performance of criminal justice systems of nations across the world. Performance was operationalized as effectiveness, equity, and efficiency, as these were attributed to be the core dimensions of criminal justice performance. A criminal justice index was created and each nations' criminal justice system was ranked based on performance, in hopes of informing future policy decisions in different nations. Thus, the quantitative measures in rational goal model approaches are used to develop a description of the criminal justice system, which is based primarily on performance and efficiency, while analysis and results are used at times to inform policy changes within different criminal justice agencies.

There are various shortcomings to the rational goal model. One criticism is that these models can only predict downstream consequences¹⁸² when a change occurs in a subsystem (Blumstein, 1972). This is problematic since changing a variable in a subsystem can affect both the succeeding and preceding stages of the criminal justice system. However, the main criticism of the rational goal model approach is that the goal of analyses conducted in this way is the

¹⁸⁰ The JUSSIM inputs include: crime types; systems stages; branching ratios (proportion of flow from one stage to the next); resources, annual unit availability of resources and cost per unit of time; matrix of unit workflow (number of crimes reported or arrests made) (Blumstein, 1972: p. 262).

¹⁸¹ The JUSSIM outputs include: flow through each processing stage; costs at each stage; resource costs; resource workloads; and resources required (Blumstein, 1972: p. 263).

¹⁸² According to Connidis (1982) downstream effects refer to the impact of preceding stages on the decisions made within a specific criminal justice agency, while upstream is the opposite, focusing on the impact of succeeding stages on decision making within an agency.

exclusive focus on improving efficiency. This singular focus mitigates the importance of other system purposes and excludes these other purposes and goals from the conceptualization of the system, resulting in a model that does not, at times, represent reality (Connidis, 1982). Similarly, the rational goal model fails to take into account the conflict that exists between subsystems based on the presence of multiple goals within each subsystem (Reich, 1973).

The approach taken through the functional model differs significantly from the rational goal model. Rather than focusing on improving the efficiency and performance within criminal justice subsystems, the functional approach is “explicitly concerned with explaining the behaviour of actors in the criminal justice system” (Connidis, 1982: p. 41). This approach is not concerned with assessing criminal justice subsystems based on their specific, or system wide, goals and how efficient each subsystem operates, but rather explaining why certain actions occur in a specific subsystem, or between different subsystems. Using a functional systems approach focuses on how a system as a whole functions and why certain behaviours occur, and does so primarily by emphasizing the importance of cooperation, exchange, and adaptation that occurs between the police, courts, and corrections subsystems (Connidis, 1982). From this perspective, the influence that organizational decision-making and processes at one level of the criminal justice system have on another level, is not only acknowledged, but is the main point of interest and assessment. Therefore, using the functional systems approach allows for the examination of the basic functioning of, and between, the different criminal justice subsystems. Using this approach is considered a necessary endeavour when conducting research focused on understanding criminal justice behaviour, given that “a failure to do so ignores a number of factors essential to an accurate understanding of CJS activities and decision making” (Connidis,

1982: p. 67). The following section outlines two examples of research that have applied the functional systems approach to assess the different components of the criminal justice system.

Functional Systems Approach: Research

Connidis (1982) applied the functional systems analysis in an overview of the criminal justice system, where the goal was to explain how the subsystems function and how each is influenced by relationships with the other subsystems. When applying the systems perspective to the criminal justice system it is apparent that it is an open system for two reasons. First, the system receives its initial input from the environment. This input occurs when offences are reported to the police, when potential perpetrators become known to the police, and when the police arrest a suspect. Additionally, the criminal justice system is considered an open system because it operates as a subsystem within the larger social system, as criminal justice operations and decision-making are affected by larger political, social, and economic environments (Boydell & Connidis, 1995; Connidis, 1982). Since the criminal justice system interacts with other social systems, it must continually respond to the changing environment.¹⁸³ Furthermore, the criminal justice system is directly affected by the operation of substantive and procedural criminal law. According to Connidis (1982),

“...because statutory law formulation is not a CJS function, law is most accurately viewed as an environmental influence on the CJS, even though decisions made in the CJS do have repercussions for the law” (p.52).

As a part of the proximate environment, criminal law provides structural criteria that guides the criminal justice system by establishing “its mandate and agencies as well as general guidelines

¹⁸³ For example, political interference can influence and manipulate certain CJS operations and decision-making in order to satisfy political goals (Turk, 1977).

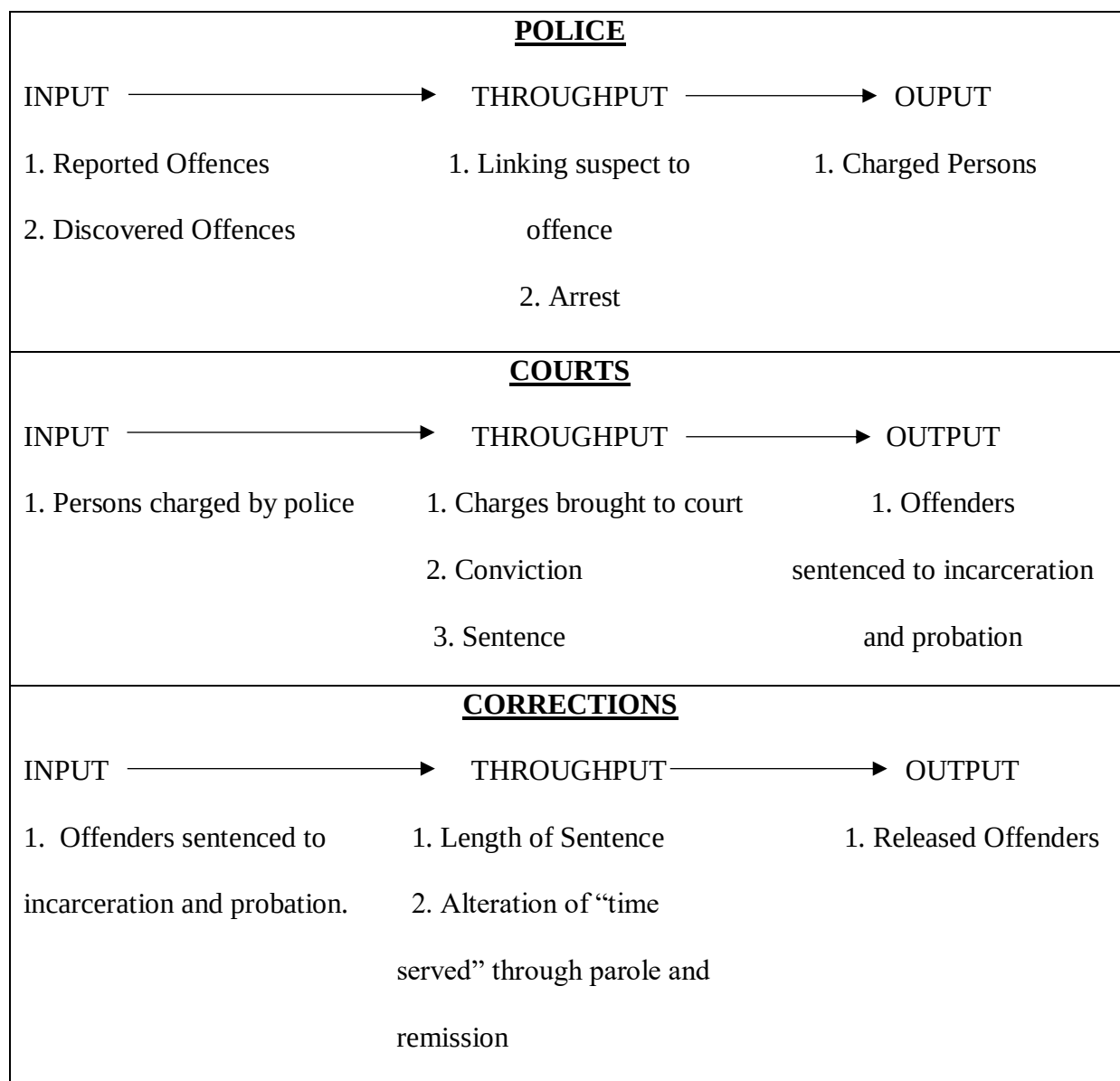
for its operations” (Connidis, 1982: p. 53). Thus, the criminal justice system is an open system that is influenced and dependent on input from its proximate and distant environment.

There are three main subsystems within the criminal justice system that are interdependent, which include the police, the courts, and correctional institutions and agencies. On a very basic level each subsystem is governed by specific legislation, and is comprised of a number of specific actors with specific roles within a hierarchical network. In the police subsystem, there is a bureaucratic structure that specifies tasks, duties, and a hierarchy of authority from the commissioner, to superintendents, down to the constables (RCMP Act, 1985). Similarly, the courts subsystem is comprised of not only the three level of courts in Canada (trial, appellate, and the Supreme Court of Canada), but also Crown and defence attorneys, judges, and juries. The corrections subsystem is made up of federal and provincial/territorial agencies that are responsible in varying ways for incarceration, parole, probation and other community level sanctions. While the above analysis is rather simplified, these main subsystems define the structural boundary of the total system, as well as provide parameters for what separates system activities from the environment (Bernard et al., 2005; Connidis, 1982). Moreover, the environment plays a significant role within the total system of criminal justice: it produces the input into the system in the form of offenders, victims, witnesses, and people who report offences (Connidis, 1982). An example of the process by which these different subsystems operate, via the input-throughput-output model, can be viewed in *Figure 2*. As Connidis (1982) notes:

“...the police depend on the public to report offences and the courts to bring charges to court; the courts depend on the police for charges and corrections to carry out sentence, and; corrections depend on the courts for sentence offenders while depending on the environment to receive released offenders” (p. 69).

The functional systems approach illustrates the interdependent relationship between the subsystems and decision-making in one subsystem, which can affect the workload and operations of other subsystems.

Feedback, both directly and indirectly affects the interdependent relationship between criminal justice agencies within this functional model. Direct feedback can vary from feedback directed at specific personnel, to feedback from one subsystem to another more generally (Boydell & Connidis, 1995). For example, judicial statements to police officers in a court room that their tactics which caused evidence presented during trial to be inadmissible would constitute a specific form of direct feedback (Goldstein, 1968 as cited in Boydell & Connidis, 1995), while a judicial decision to prohibit the police from using a particular technique (i.e. for interrogation or collection of evidence) that garnered inadmissible evidence would be direct feedback of the general form. Moreover, precedent, or *Stare Decisis*, in a common law legal system also represents a form of direct feedback as precedent constrains a judge to decide a pending case according to the rules laid down by the earlier decisions (Shapo, Walter & Fajans, 2013). In following pre-existing rules of law, it is necessary for the lower courts to accept and follow the decisions of the higher courts (Samuel, 2013), which is representative of direct feedback at work. On the other hand, criminal justice subsystems also heavily rely on indirect forms of feedback for information sharing, which involve "...the assessment of another subsystem's activities as first, pertinent to decision making, and, secondly, directing a particular type of decision" (Connidis, 1982: p.70). An example of indirect feedback is apparent in the influence of judicial practices regarding adjudication and sentencing as a guide to the decision-making for the police and prosecution. In regards to the former, a judge's history of decision-

Figure 2.

(Connidis, 1982: p. 59)¹⁸⁴

making and sentencing with respect to a particular charge can inform the police on a likely outcome of a potential arrest, influencing their decision to arrest a suspect or not (Cole, 1975 as cited in Connidis, 1982). While a prosecutor can use a judge’s sentencing history in plea

¹⁸⁴ There are a few throughputs and outputs missing from Connidis (1982) model. For instance, the police can release an individual back to the community after they have arrested that person, but do not proceed with charges. Also, the courts can acquit an individual back to the environment since all convicted persons do not end up in correctional facilities.

negotiations, wherein the past performance of the judge adjudicating a certain crime can be used as an incentive to negotiate a plea deal. Since the feedback is indirect, the interpretation of the feedback is subjective in nature, which can lead to errors in communication between subsystems. However, the information is perceived, the feedback influences how information is gained and used in other subsystems by regulating and enacting standards on the information at either preceding or succeeding stages in the system (Boydell & Connidis, 1995).

The interdependent relationship between the different components of the criminal justice system is also affected by each agency's need for functional autonomy. The non-hierarchical structure of the overall criminal justice system allows each agency within the system an initial level of functional autonomy (Connidis, 1982). The functional autonomy within each subsystem refers to the level in which that agency operates and renders decisions independent of the rest of the subsystems. Each subsystem attempts to maximize the level of functional autonomy it can achieve, a process that is carried out mainly through decision-making specific to each agency, which is geared toward organizational goals and structure. Decision-making and discretion become the focal point, as decisions are mainly concerned with the acceptance of inputs, and processing these inputs as outputs to other subsystems.¹⁸⁵ Thus, in order to understand the operation within, and between criminal justice subsystems, the interdependent relationship and the resistance to that interdependence through upholding functional autonomy is necessary (Connidis, 1982).

An example of the attempt to maintain functional autonomy while also relying on the operation of other subsystems is apparent in the relationship between the police and the courts. The police, as an organization, possess a great deal of discretion and functional autonomy, given

¹⁸⁵ The decision making within an agency functions is an affirmation of its functional autonomy, while also declaring the level of interdependence needed with other agencies (Connidis, 1982)

that they represent the first stage in criminal justice processing. When a patrol officer makes a decision, it may seem as though discretion is high, when in fact that discretion is limited by reviews in the succeeding stages of the system and legal restrictions imposed by the courts (Connidis, 1982). Furthermore, the courts control the cases that are accepted as input in the subsystem, which also hinders the functional autonomy and discretion of the police. This is just one example of the struggle for a criminal justice subsystem to maintain functional autonomy while also relying on another subsystem to absorb its output material.

Conflict can arise between criminal justice subsystems as a result of the interplay between the needs of interdependency and functional autonomy. Conflict may occur when a subsystem attempts to achieve its sub-goals and this pursuit is dependent on the actions of other subsystems (Boydell & Connidis, 1995; Reiss, 1971). This reliance decreases a system's capability to function autonomously. In addition to the pursuit of achieving different sub-goals, conflict between the subsystems can occur as a result of the agencies' specific policies and purposes (O'Leary & Newman, 1970). An example of conflict between the courts and the police occurs when the courts evaluate the actions by the police, which can cause conflict between a judge who plays a rule-handling role when compared to the police who play a situation-handling role when producing an output for the courts (Connidis, 1982; Skolnick, 1975). Applying a functional systems perspective in this regard allows for conflict to be acknowledged and addressed.

Bernard et al. (2005) have also applied a functional systems analysis to research of the criminal justice system, as using this approach "... can generate substantial insights into the structure and functioning of criminal justice" (pg. 205). Similar to the systems approach outlined by Connidis (1982), Bernard et al. (2005) address how the functioning of the criminal justice system is properly understood using a systems perspective. In this analysis, key components of

the systems perspective are outlined to offer a conceptual framework to explain criminal justice operations. This framework contends that the criminal justice system is comprised of multiple layers that each possess their own subsystems with independent inputs, processes, and outputs, while the system processes ‘cases’ that can include offenders, victims and the public. When the processing of these cases ends prior to their ‘completion’, the cases return to the system as ‘defective’. Within the total system, there is close to no agreement on how to achieve the goals of criminal justice processing, and this lack of agreement is caused by actors within the system not having objective standards on whether a case is fully processed or not, meaning that at each stage actors have the option to determine if the processing of a case is complete. ‘Backward pressure’ is enacted to reduce the flow of cases to the next stage in the system, so each subsystem is pressured to output a certain number of cases to the environment.¹⁸⁶ Forward pressure is created in order to counteract the backward pressure because when a case is sent to the next stage of the system by an criminal justice actor, the blame for defective processing is limited (Bernard et al., 2005: p. 205-207).

Rather than solely focusing on the operation within one criminal justice agency, Bernard et al. (2005) contend that criminal justice agencies must be examined from a perspective that highlights the forward and backward pressure generated from the specific agency’s location in the system. Therefore, analyzing and describing the actions within one agency is best understood within the context of the whole system. The current research project seeks to incorporate this view, not focusing so much on forward and backward pressures to close cases like the focus of Bernard et al. (2005), but more so on how the forward and backward interdependent relationship between subsystems can affect each agency’s decision-making and operations.

¹⁸⁶ This backward pressure supplements the fact that it is quicker and easier to decide that processing is complete than to send the case to the next stage for additional processing

The analysis provided by Connidis (1982) and Bernard et al. (2005) applies the framework of the functional systems approach to the criminal justice system in a very general manner. A study conducted by Goldstein (1993) that assessed discretion and the functional operation of the police subsystem is an example of a functional systems approach of a specific kind. The study focused on how the American Bar Foundation (ABF) survey¹⁸⁷, influenced certain functions within the policing subsystem including, “the definition of the police function, the refinement of police authority, the structuring of discretion, and the establishment of new systems of accountability” (Goldstein, 1993: p. 61). These changes in the structure and operations in the police subsystem were found to also affect other criminal justice subsystems, given that the flow of material through the system starts with the police.

The application of the functional systems approach when analyzing the criminal justice system can be performed at both a general and specific level, as evident in the research discussed above. The research conducted in this area provides a foundation for understanding how the components within criminal justice operate and how the interdependent relationship between the subsystems can influence another’s functioning and decision-making. It is these elements of the functional systems approach that will be used as the main method of analyzing the case decisions in this study.

Undercover Confession Evidence: A Functional Systems Analysis

According to Hagen (1969), when a systems analysis is used to study social systems, the scope of the analysis is typically either a general or partial systems analysis. It can be said that Connidis’ (1982) and Bernard et al. (2005) functional systems analyses are of the general kind,

¹⁸⁷ In this “survey” knowledgeable observers well versed in different aspects of policing would accompany police officers during their daily tasks, and collected data for the study (Goldstein, 1993).

given the very broad scope of applying the functional approach to all aspects of the system. On the other hand, the research conducted by Goldstein (1993) can be considered a partial systems analysis, as this research focused mostly on changes brought on within the police subsystem, while not analyzing in great detail the impact those changes would have on the other components of the criminal justice systems.

The scope used in the current research study will engender aspects of both the general and partial forms, but will ultimately represent a partial systems analysis that undertakes a functional systems approach. The analysis will use all of the central features of the functional approach taken by Connidis (1982), but will focus solely on the specific context of undercover police operations and the court's interpretation of confession evidence that emerges from those operations. Further, the functional approach in this study is considered partial since the emphasis solely concentrates on the police and courts subsystems, with no attention paid to the corrections subsystem. The correctional subsystem is disregarded as not relevant in this analysis.¹⁸⁸ This position has been echoed by others who have applied a general systems analysis to the criminal justice system, as the corrections subsystem is not often viewed as an active subsystem due to its low functional autonomy and high dependence on the output of other subsystems (Connidis, 1982).

There are certain limitations to using a functional systems analysis approach. Primarily, when this approach is applied to the criminal justice system it can be conceived as somewhat simplistic. This is due to the self-evident nature of the connections made within the system, as it is intuitive that changes in one subsystem will have some sort of impact on other components of the

¹⁸⁸ The only focus on the correctional subsystem, per se, is the outputs that the court subsystem produces (convicted individuals) which in turn function as an input for the correctional subsystem. However, this connection will not be assessed further than a simple acknowledgement.

system. With that being said, using the functional systems approach does much more than simply acknowledge a particular influence or impact, and goes beyond a basic level of analysis to assess the degree of how different actors and subsystems are affected by each other. In this way, it allows for understanding of how a particular court decision can affect the roles of other actors within the court subsystem, and also members of the police.

Thus, a partial functional systems analysis, which uses all the principles and features of a general analysis, will be employed in this study. The functional systems analysis will act as a lens to analyze the sixteen cases that have occurred since the decision in *Hart*. By following the principles set out in a functional systems analysis, this approach will describe and further analyze how the courts have interpreted the new admissibility test and conclude with thoughts on how this could also affect the functioning of the police and courts subsystem.

Justifying a Conceptual Framework

A theoretical framework can serve many purposes in a qualitative research project within the social sciences, and the most common purpose is to present a logically connected system of general propositions in order to establish a relationship between two or more variables (Abend, 2008). The use of theory also serves as a systematic way of explaining an empirical phenomenon within the social world, while providing a perspective from which a researcher interprets the subject they are examining (Abend, 2008). On the other hand, a conceptual framework is a set of key terms, that are organized to highlight the relationship amongst the concepts in order to represent different aspects of a process for the purpose of guiding research methods and design (Botha, 1989; Vesely, 2017). A conceptual framework guides the researcher in organizing the subject matter concerning the particular topic they are exploring (Vesely, 2017).

In terms of the approach taken in this research study, many proponents of general systems theory hold that systems theory is not actually a theory, but rather a perspective or an approach that is adopted when conducting research (Connidis, 1982; Cortes, Przeworski, & Sprague, 1974; Sutherland, 1973). As a result, most researchers who apply a systems analysis tend to refer to it not as a theory but an approach, framework, or perspective. Using a systems approach requires the researcher to develop the perspective as it pertains to the research, rather than choosing a theory and testing its explanatory power (Connidis, 1982). Thus, users of a systems approach have held that it is a conceptual framework that is adapted to the subject matter (different types of open and closed systems) that the researcher is exploring.

In this project, the main concepts and principles of a functional systems analysis (interdependency, functional autonomy, feedback, and conflict, etc.) provide the foundation of a conceptual framework that is applied to the court's interpretation of the evidentiary rule developed in *Hart*. This interpretation is examined in order to view the extent of the impact that the decisions in each case has on the different components of the criminal justice system. Furthermore, the nature of this study is more conducive to the use of a conceptual framework as the research and the analysis provided is of a practical form due to the significant legal focus of the subject.

CHAPTER 5

Findings and Discussion:

Examining the Impact of the New Admissibility Rule

Introduction

In order to understand the impact of the new admissibility rule that as developed in *Hart*, cases that were heard after *Hart*, from 2014-2016 were analyzed through a content analysis. This analysis sought to uncover how the courts have interpreted the new admissibility rule and the impact this interpretation has had on the determination of admissibility and the outcome of the cases. The analysis also sought to explore how this interpretation by the courts has affected the roles of the different actors within the criminal justice system. In order to do so, the analysis is focused on a sample of the 16 cases that have occurred since *Hart*, which include seven cases heard on appeal, six cases that solely involved the *voir dire* that determined the admissibility of the confession into trial, and three cases that involved the *voir dire* and the trial decision. All but one of the cases under analysis involved a serious offence of either first-degree murder, second-degree murder, or attempted murder.¹⁸⁹

Prior to exploring the main findings of the case analysis, the immediate impact that occurred following the implementation of the new admissibility rule will be examined. Then, the significant findings from the analysis will be outlined, which are grouped into thematic categories. These results range from how the elements of the rule were decided by the courts, to other various trends that were evident in the application of the rule. Within each finding of the case analysis, the general systems theory perspective was considered in order to further situate and understand the impact of the new evidentiary rule on the different subsystems within criminal justice. However, in order to understand any changes or effects caused by the new

¹⁸⁹ Seven cases involved first degree murder, there was one case of first degree murder and attempted murder, six cases involved second degree murder, one case was of second degree murder and indignity to a body, and one case involving improperly or indecently interfering with or offering an indignity to a dead body.

admissibility rule that may be evident in the case analysis, it is first necessary to understand how the different criminal justice subsystems operated prior to the *Hart* decision.

An Application of General Systems Theory to the “Mr. Big” Sting prior to *Hart*

The guiding principles of general systems theory can be used to conceptualize the functioning of criminal justice components in regards to the undercover operation and the confession evidence it produces. A main point of emphasis in this application have to do with those who are involved in the collection of confession evidence and how this evidence is used and interpreted by the actors in the courts subsystems. Initially, the police receive the input for their subsystem from the environment in the form of materials (or rather cases) that will be processed through the system. In “Mr. Big” sting cases this typically occurs when the RCMP have identified a suspect, but do not have enough incriminating evidence to arrest the suspect. As a result, the RCMP enacts the undercover operation in order to obtain sufficient evidence, wherein the main throughput¹⁹⁰ for the police are the techniques used during the operation. These include tactics used to recruit the target into the criminal organization through the use of either: a grand prize winner¹⁹¹, police custody¹⁹², use of a third party¹⁹³, or a staged breakdown of a

¹⁹⁰ The term throughput can also be used interchangeable with processes, as both terms refer to the action by a particular subsystem to transform the input material to an output.

¹⁹¹ Undercover operatives go door-to-door posing as a marketing company offering the suspect a chance to win a grand prize in exchange for filling out a survey. As time passed, the target would be informed that they had won the grand prize. Undercover officers posing as members from the criminal organization would also be at the event (prize) and make efforts to establish a relationship. For example, in one case the grand prize was tickets to a Calgary Flames game, where the occupants in the seats next to the target were undercover officers (Keenan & Brockman, 2010: p. 54).

¹⁹² A relationship is established between the target and an undercover officer while the suspect is in police custody. The target is typically informed of, and proposed a potential position within the fictitious organization at that time (Keenan & Brockman, 2010: p. 53-54).

¹⁹³ The undercover operatives would establish a relationship with someone close to the accused as an avenue of getting introduced to the accused (Keenan & Brockman, 2010: p. 55).

vehicle.¹⁹⁴ Next, the RCMP typically enact a number of scenarios using financial and social inducements to draw in suspects, while also using staged violent scenarios and psychological manipulation throughout the operation and during the final meeting with “Mr. Big”.¹⁹⁵ The RCMP enjoyed full discretion when selecting from the wide range of techniques used in the operation, as the courts have not pronounced on the use of these techniques.

Within the systems framework, an individual charged by the police then becomes the input for the court subsystem, where there are many actors responsible for processing the case, including defence lawyers, crown attorneys, judges, and juries. First, the role of the defence lawyer is to advocate on behalf of their client in order to clear the accused of the charges. With respect to cases involving confession evidence from a “Mr. Big” sting, this typically entailed various arguments raised by the defence as to why the confession evidence is unreliable. The basis of these challenges include: a possible violation of the suspects *sec.7 Charter* right to silence, questions regarding voluntariness as per the confessions rule¹⁹⁶, an abuse of process by the police¹⁹⁷, that a confession in the undercover operation is a hearsay statement and should be governed by the necessity and reliability requirement¹⁹⁸, and challenging the admission of the confession based on the prejudicial effect of the bad character evidence it would raise.¹⁹⁹ When defence counsel challenge the reliability and admission of the confession evidence, judges

¹⁹⁴ Undercover officers would stage a breakdown of a vehicle near the residence of the target as an attempt to establish a relationship when the suspect stops to help the undercover operatives (Keenan & Brockman, 2010: p. 56).

¹⁹⁵ See pages 21-26.

¹⁹⁶ Of the 81 cases studied by Keenan and Brockman (2010), 27 cases brought challenges stating that the confession had been made as a product of implied threats, psychological manipulation and significant inducements offered by a person in authority (p.68).

¹⁹⁷ This defence was raised in 17 of the 81 cases in the Keenan and Brockman study (2010), where they argued that the tactics used by undercover officers exceeded that of acceptable police conduct (p. 69-70).

¹⁹⁸ In 10 of 81 cases this defence was raised arguing that the statements made to undercover officers were hearsay statements, and therefore, the application of the necessity and reliability analysis, an approach established by the Supreme Court for determining the admissibility of hearsay statements, should have been applied (Keenan & Brockman, 2010: p. 75).

¹⁹⁹ This challenge was brought by the defence in 17 of the 81 cases studied by Keenan and Brockman (2010).

typically have denied these challenges.²⁰⁰ Another point of contention, raised by the defence, involves a lack of instruction from the judge to the jury regarding the prejudicial nature of the bad character evidence that is usually presented in the Crown's case.²⁰¹ Judges were not required to make these instructions, meaning that juries would not regularly receive instructions regarding the reliability issues that accompany this type of confession evidence. The job of Crown Attorneys, on the other hand, is to aim to prove that the defendant is guilty beyond a reasonable doubt. This attempt to establish guilt has largely been predicated on the use of, and significance placed upon, confession evidence obtained by the sting in these cases.²⁰² In addition to the confession, the Crown typically presents the accused's involvement in the fictitious criminal organization and the subsequent illegal activity carried out while a member, which can signify the bad character of the accused to the jury.

A confession obtained through a "Mr. Big" sting often results in a conviction at the trial level as the RCMP boast a 95% conviction rate as of 2004 (Smith et al., 2009). From a systems perspective, this astonishingly high conviction rate acts as a form of indirect feedback from the courts to the police subsystem indicating that the tactics used in the operation were an effective means of accomplishing a conviction, which appears to be a main goal for the police.²⁰³ The corrections subsystem would then receive the convicted individual as an input. As stated earlier, this aspect of the systems framework is not of great importance in this analysis.

²⁰⁰ This was discussed in Chapter Two.

²⁰¹ The argument for limiting instructions to the jury in regards to the bad character evidence of the accused was only challenged on appeal in 8 of the 81 cases (Keenan & Brockman, 2010). The argument was that "the trial judge erred in failing to sufficiently instruct the jury about drawing adverse inferences against the accused because of his or her participation in the criminal enterprise."

²⁰² As mentioned on page 26, a "Mr. Big" sting confession is typically the sole piece of evidence in these cases. When it is the only piece of evidence against the accused, the confession can be strengthened by video/audio tape recordings of the confession itself or transcripts of other incriminating statements made throughout the operation (Video/audio tape recordings or transcripts were admitted in 52 of 81 cases [Keenan & Brockman, 2010: p. 83]).

²⁰³ According to Connidis (1982), conviction and sentence frequently represent confirmation to the police of their competence and effectiveness.

A Systems Analysis of the “Mr. Big” Sting since *Hart*:

From a systems perspective, the development of this new evidentiary rule may affect the different actors within criminal justice as it is recognized as a form of direct feedback to other components of the criminal justice system. This direct feedback is generated from a specific part of the courts subsystem, the Supreme Court of Canada, which sets legal precedent and informs other components within the courts subsystem, as well as the subsystem of the police. The Supreme Court of Canada has now ruled that all confession evidence from a “Mr. Big” sting is considered presumptively inadmissible. More specifically, trial courts are now required to conduct a *voir dire* to determine the admissibility of “Mr. Big” sting confession evidence at trial. Appellate courts also receive this direct feedback and will have to apply the new admissibility test in cases being appealed on grounds concerning the use of this confession as evidence.

The roles of other actors within the court subsystem, including crown attorneys and defence lawyers, have also been affected as a result of the *Hart* decision. Crown attorneys now have the responsibility of establishing that a confession from a “Mr. Big” sting is reliable in order for the evidence to be admissible. Previously, the Crown was not burdened with this responsibility, as the focus on reliability was a task charged to the defence. The role of the defence attorney has also shifted when challenging the admissibility of this confession evidence, as they must now prove that an abuse of process by way of police misconduct took place during the undercover operation. As a result, the roles of the crown and defence attorneys with respect to questions of reliability of confession evidence have effectively been reversed. Furthermore, the implementation of the new admissibility rule acts as direct feedback for the police subsystem as well. The decision in *Hart* effectively holds the police more accountable in that the techniques

and tactics used in their undercover operation (throughput) to obtain a confession and arrest (output), can be reviewed by the court in future cases. While it is impossible to definitively assess at this juncture, it may be that police practices in garnering these confessions will also change.

The Impact of the New Admissibility Test: Findings

The following discussion highlights the findings from the content analysis of the 16 cases that have been heard since the *Hart* decision. The general results from the analysis, concerning determinations of admissibility, proper jury instructions, the trier of fact in the case, and the outcome of the cases, from appeal decisions and cases that included both a *voir dire* and the trial outcome are outlined in *Table 2*, whereas *Table 3* contains the findings related to cases that strictly involved a *voir dire*. The discussion that follows has categorized the most significant findings from the case analysis into different thematic sections. Each finding from the analysis will be concurrently examined from a general systems standpoint in order to further situate how the new admissibility test has affected the different subsystems within the criminal justice system and the roles of the actors within these subsystems.

I) An Addendum to the Admissibility Rule

The case of *Mack* was heard by the Supreme Court of Canada in conjunction with *Hart*, and it became the second case, following *Hart*, to apply the new admissibility rule to this type of confession evidence. Dax Mack had been convicted at trial for first-degree murder based on

Table 2.

Case	Charge	Level of Court	Trier of Fact	Did the Confession meet the Reliability Standard?	Was the Confession gained by an Abuse of Process?	Confession Ruled Admissible?	Proper Instruction to the Jury?	Outcome of the Case
<i>R. v. Allgood</i> , [2015] S.J. No. 387	First Degree & Attempted Murder	Saskatchewan Court of Appeal	Judge Alone	Yes	Yes	Yes	N/A	Appeal Dismissed. Conviction Affirmed.
<i>R. v. Hales</i> , [2014] S.J. No. 750	Second Degree Murder	Saskatchewan Court of the Queen's Bench (<i>Voir Dire</i> & Trial Verdict)	Judge Alone	Yes	Yes	Yes	N/A	Found Guilty of <i>Second Degree</i> Murder. Conviction Entered.
<i>R. v. Johnston</i> , [2016] B.C.J. No. 3	Second Degree Murder	British Columbia Court of Appeal	Judge Alone	Yes	Yes	Yes	N/A	Appeal Dismissed. Conviction Affirmed.
<i>Laflamme v. R.</i> , [2015] Q.J. No. 8925	First Degree Murder	Quebec Court of Appeal	Judge and Jury	Yes	No	No	No	Appeal Allowed. Stay of Proceedings Ordered.
<i>R. v. Mack</i> , [2014] S.C.J. No. 58	First Degree Murder	Supreme Court of Canada	Judge and Jury	Yes	Yes	Yes	Yes	Appeal Dismissed. Conviction Affirmed.
<i>R v. Magoon</i> , [2015] A.J. No. 607	First Degree Murder	Alberta Court of the Queen's Bench (<i>Voir Dire</i> & Trial Verdict)	Judge Alone	Yes	Yes	Yes	N/A	Found Guilty of <i>Second Degree</i> Murder. Conviction Entered.
<i>Perreault v. R.</i> , [2015] Q.J. No. 3389	First Degree Murder	Quebec Court of Appeal	Judge and Jury	Yes	Yes	Yes	No	Appeal Allowed. New Trial Ordered
<i>R. v. Randle</i> , [2016] B.C.J. No. 526	Improperly or indecently interfering with, or offering an indignity to, a dead body	British Columbia Court of Appeal	Judge Alone	Yes	Yes	Yes	N/A	Appeal Dismissed. Conviction Affirmed.
<i>R. v. Streiling</i> , [2015] B.C.J. No. 1618	Second Degree Murder	British Columbia Supreme Court (<i>Voir Dire</i> & Trial Verdict)	Judge Alone	Yes	Yes	Yes	N/A	Found Not Guilty.
<i>R. v. West</i> , [2015] B.C.J. No. 1943	First Degree Murder	British Columbia Court of Appeal	Judge Alone	Yes	Yes	Yes	N/A	Appeal Dismissed. Conviction Affirmed.

Table 3.

Case	Charge	Level of Court	Did the Confession meet the Reliability Standard?	Was the Confession gained by an Abuse of Process?	Confession Ruled Admissible?
<i>R. v. Balbar</i> , [2014] B.C.J. No. 3232	Second Degree Murder	British Columbia Supreme Court (<i>Voir Dire</i> at Trial)	Yes	Yes	Yes
<i>R. v. Keene</i> , [2014] O.J. No. 6511	Second Degree Murder & Indignity to a body	Ontario Superior Court of Justice (<i>Voir Dire</i> at Trial)	Yes	Yes	Yes
<i>R. v. Ledesma</i> , [2014] A.J. No. 1468	Second Degree Murder	Alberta Court of Queen's Bench (<i>Voir Dire</i> at Trial)	Yes	Yes	Yes
<i>R. v. M.M.</i> , [2015] A.J. No. 1289	First Degree Murder	Alberta Court of Queen's Bench (<i>Voir Dire</i> at Trial)	Yes	Yes	Yes
<i>R. v. Mildenerberger</i> , [2015] S.J. No. 515	First Degree Murder	Saskatchewan Court of the Queen's (<i>Voir Dire</i> at Trial)	Yes	Yes	Yes
<i>R. v. Tingle</i> , [2015] S.J. No. 348	First Degree Murder	Saskatchewan Court of the Queen's (<i>Voir Dire</i> at Trial)	Yes	Yes	Yes

confession evidence obtained by the RMCP undercover operation²⁰⁴ and the Alberta Court of Appeal affirmed the conviction. On appeal to the Supreme Court, Mack challenged his conviction on several grounds, including that the trial judge should have excluded the confessions to undercover officers during a “Mr. Big” operation; if the confessions were admissible, the trial judge had not adequately instructed the jury on the dangers associated with them.²⁰⁵ However, the Supreme Court of Canada dismissed the appeal, ruling that the confession

²⁰⁴ Mack was subjected to 30 scenarios during the undercover operation, where he regularly completed various tasks (delivering packages, repossessing vehicles) in exchange for a total payment of \$5000 over 4 months (*Mack*, para. 7-16)

²⁰⁵ *Mack supra* note 170 at para. 2.

was admissible under the new standards set out in *Hart* and that the trial judge had properly instructed the jury about the potential problems with the evidence.

In coming to this decision, the Supreme Court set forth guidelines for instructions to the jury pertaining to the reliability of the confession and the prejudice of the “Mr. Big” sting evidence. The Supreme Court recognized that the instructions will vary on a case-to-case basis given the nature of the evidence²⁰⁶, and that guidance provided does not follow a “prescriptive formula”.²⁰⁷ The provisions set forth by the Supreme Court of Canada are as follows:

“...the trial judge should tell the jury that the reliability of the accused's confession is a question for them. The trial judge should then review with the jury the factors relevant to the confessions and the evidence surrounding it...Thus, the trial judge should alert the jury to “the length of the operation, the number of interactions between the police and the accused, the nature of the relationship between the undercover officers and the accused, the nature and extent of the inducements offered, the presence of any threats, the conduct of the interrogation itself, and the personality of the accused”.²⁰⁸

“[M]oreover, the trial judge should discuss the fact that the confession itself may contain markers of reliability (or unreliability). Jurors should be told to consider the level of detail in the confession, whether it led to the discovery of additional evidence, whether it identified any elements of the crime that had not been made public, or whether it accurately described mundane details of the crime the accused would not likely have known had he not committed it”.²⁰⁹

“[W]ith respect to the bad character evidence that accompanies a ‘Mr. Big’ confession...the trial judge must instruct the jury that this sort of evidence has been admitted for the limited purpose of providing context for the confession. The jury should be instructed that it cannot rely on that evidence in determining whether the accused is guilty”.²¹⁰

The Supreme Court took the problems highlighted in *Hart*²¹¹ and effectively created an amendment to the new admissibility rule in which trial judges ought to follow the guiding

²⁰⁶ *Ibid* at para. 50

²⁰⁷ *Ibid* at para. 51

²⁰⁸ *Ibid* at para. 52

²⁰⁹ *Ibid* at para. 53

²¹⁰ *Ibid* at para. 55

²¹¹ Including the circumstances in which the confession was made, markers of reliability in the confession itself, and the prejudicial nature involved in evidence from the undercover operation.

principles when instructing a jury about this type confession if it is deemed admissible after the *Hart* test was applied.

From a systems perspective, it is evident that the new parameters set out by the Supreme Court represent a form of direct feedback, in the form of legal precedent, to various components within the courts subsystems. Primarily, the trial judges who preside over cases involving this form of confession evidence are now provided with specific guidelines on how to properly instruct a jury about the problematic aspects of “Mr. Big” sting evidence. Similarly, appellate judges also receive these guidelines as they may be required to use these newly implemented guidelines to assess past jury instructions, particularly if an appellant challenges their conviction on this basis. Furthermore, these guidelines could possibly affect the decision-making process of a jury. Given that judicial instructions are now available to trial judges, juries can now be properly informed on issues of reliability and prejudice that accompany evidence from the undercover operation, which could help in making an informed decision. Thus, the new parameters placed on the instruction to the jury have acted as feedback that could potentially influence the decision making and roles of several actors within the courts subsystem.

II) Application of the New Jury Instruction Guidelines

*R v. Perrault*²¹² is one of two cases on appeal that specifically assessed a trial judge’s instruction to the jury. This case was heard in the Quebec Court of Appeal, where Alain Perrault was appealing a first-degree murder conviction.²¹³ Mr. Perrault originally appealed his conviction in 2013 citing the unreliability of the confession evidence used to convict him; that appeal was dismissed. Upon appeal to the Supreme Court of Canada, the case was remanded

²¹² *R v. Perrault*, [2015] Q.J. No. 3389 [*Perrault*]

²¹³ *Ibid* at para. 6

back to the Quebec Court of Appeal for disposition in accordance with the *Hart* ruling.²¹⁴ Mr. Perrault only raised one ground of appeal, which centered upon the admissibility of the confession procured through the “Mr. Big” operation.²¹⁵ The Quebec Court of Appeal ultimately deemed the confession admissible after deciding that the Crown had proved that the confession’s probative value outweighed its prejudicial effect, and found that the defence could not prove that an abuse of process had occurred. Since the confession was ruled admissible, the courts’ attention consequently turned to whether the jury had been properly instructed.

In assessing the trial judge’s instructions to the jury, the Quebec Court of Appeal determined that:

“The instructions to the jury were inadequate with regard to the reliability of the confession and its prejudicial effect... As concerns the video of the confession, the judge instructed the jury that that evidentiary item was admissible and that it was up to the jury to decide whether the appellant actually made the statements. He also instructed the jurors that it was up to them to decide its probative value. He did not discuss the reliability of the confession... Indirectly, the judge encouraged the jury to adopt a line of reasoning that increased the prejudicial effect of the confession, i.e. he invited the jury to take into account words spoken in the scenarios -- during which the appellant did not confess anything, but showed that he was capable of committing various other unrelated crimes -- to assess his credibility. In a way, the judge invited the jury to use evidence of the appellant's criminal propensity to conclude that the appellant may have lied in his testimony... Consequently, he did not provide the jury with the tools it needed to address the concerns about reliability and prejudice that arose from the confession”.²¹⁶

²¹⁴ *Ibid* at para. 9

²¹⁵ The undercover operation spanned over three and a half months and included forty-one total scenarios. Perrault completed various tasks for the organization in exchange for remuneration, while he also developed a strong social bond with some of the undercover officers. In a meeting discussing Perrault’s admission into the organization, “Mr. Big” informed Perrault that he had obtained information about his past criminal activity and wanted Perrault to be honest about these details in order to earn full-time membership within the group. Perrault then offered the details and was subsequently arrested (*Perrault*, para. 14-16).

²¹⁶ *Ibid* at para. 92; 94-95.

In this case, the Court found that the trial judge erred in both warning the jury about the prejudicial nature of the evidence and issues of reliability. Based on these shortcomings a new trial was ordered.²¹⁷

Moreover, *R v. Laflamme*²¹⁸ was the only other case in this analysis that used the jury instruction guidelines set out in *Mack*. In *Laflamme*, the Quebec Court of Appeal ruled that the instructions to the jury at trial were improper, and would have justified the ordering of a new trial if a stay of proceedings had not already been issued for an abuse of process.²¹⁹ The trial judge's instruction to the jury were as follows:

*“This entire block of evidence is relevant to determining an issue that you have to resolve in this case. Were the confessions made to Mr. Big during the forty-first scenario on April 23, 2008, true? ...You may not, you must not, use this evidence as propensity evidence. You cannot use this evidence to say, “Laflamme was the kind of guy to get involved in anything that he believed were criminal acts. He must be the kind of person who murdered his wife in '76”. If you adopt this method or way of analyzing, you will be making a serious error...You must look at all the evidence adduced in this case to determine whether the confessions are true”.*²²⁰

The court determined that the instruction was “defective”²²¹ and strayed from the elements of the guidelines set forth in *Mack* since the instructions did not “alert the jury to the concern about the reliability of the confession [or] to highlight the factors relevant to assessing it”.²²²

From a systems perspective, these two rulings are important for several reasons. *Perrault* was the first case to use the legal precedent established by *Mack*, which *Laflamme* followed. These decisions effectively convey the influence of the feedback enacted by one level within the

²¹⁷ *Ibid* at para. 100

²¹⁸ *R v. Laflamme*, [2015] Q.J. No. 8925 [*Laflamme*]

²¹⁹ *Ibid* at para. 91

²²⁰ *Ibid* at para. 94

²²¹ *Ibid* at para. 95

²²² *Ibid*

court subsystem (*Mack*) onto other levels within the same subsystem. In doing so, the Quebec Court of Appeal reaffirmed the guidelines set out in *Mack* and provided more guidance to trial and appellate judges in terms of what constitutes proper instructions to a jury. Furthermore, the *Perrault* decision also informs trial and appellate judges as to what is not permitted in a jury instruction, as the instruction in this case did not negate the prejudicial effect, but rather encouraged "...the jury to adopt a prejudicial reasoning".²²³ These decisions can also provide direction regarding significant aspects of jury instructions to defence attorneys who are appealing a conviction on these grounds. Lastly, *Perrault* established precedent for other courts to follow as the Crown in this case stated that the appeal should be limited to an assessment of the confession's admissibility.²²⁴ The Quebec Court of Appeal disagreed, ruling that "If the confession is admissible in evidence in accordance with *Hart*, the jury must be correctly instructed in accordance with *Mack*".²²⁵ Thus, once a confession is deemed to be admissible, the court ought to proceed to determine whether the instruction to the jury adhered to the guidelines laid out in *Mack*, regardless if this were the grounds for appeal submitted by the defence.

As for the other 4 cases on appeal in this analysis, the new jury instruction guidelines were not applicable since these cases were originally tried by judge alone. Moreover, the other three cases at the trial level that rendered a decision were also tried by judge alone. Given that only two of the fifteen cases that were heard after *Mack* were tried by a judge and a jury, the influence of this addition to the admissibility rule could be limited in its influence. However, its impact has been significant as the only two cases to apply the guidelines determined that the trial judge's instructions were inadequate.

²²³ *Ibid*

²²⁴ *Ibid* at para. 98

²²⁵ *Ibid* at para. 99

III) The Anomaly

The ruling in *Laflamme* provided a decision that was distinct from all other cases in this analysis. In this case, Michel Laflamme appealed his conviction for first-degree murder that was predicated on “Mr. Big” confession evidence.²²⁶ On appeal, Laflamme issued five grounds of appeal, two of which centered on issues laid out in *Hart* and *Mack*. The defence argued that an abuse of process had occurred based on the type of violent scenarios that were used by undercover officers in the operation and the social inducements present. After applying the new admissibility test, the Quebec Court of Appeal determined that an abuse of process had occurred as a result of police misconduct and ruled the confession evidence inadmissible, which resulted in a stay of proceedings.

The main concern regarding the violent scenarios used in this particular undercover operation was that some of the violent acts were carried out against *other* members of the criminal organization”²²⁷, one of whom was an alleged bank employee named Caroline, who performed various credit card transactions for the criminal organization.²²⁸ One of the staged violent scenarios involved:

“The appellant once again met Caroline, the bank employee who collaborated with the Organization, who had previously provided the Organization with credit cards. Vince claimed that she owed the Organization money and that she had “started talking”. During this scenario, the appellant was driving the car, and Vince was sitting in the back seat with Caroline beside him. Vince suddenly grabbed her by the throat, made serious

²²⁶ The undercover operation lasted four and a half months, and included 41 scenarios. Over the course of the operation, Laflamme completed various jobs for the group and developed a strong social bond with the other members. Laflamme was also subjected to various scenarios of violence carried out in front of him.

²²⁷ *Ibid* at para. 61: “the seventeenth scenario is important, particularly in light of subsequent scenarios, one of which involved a scene of violence and serious threats against someone working for the Organization”.

²²⁸ *Ibid*

threats, and pointed a 9-mm gun at her face. He then brutally threw her from the vehicle. This extremely violent scene did not go unnoticed by the appellant”.²²⁹

Accompanying this graphic scene of violence, and other staged acts of violence throughout the operation²³⁰, Laflamme had also begun to develop a serious social bond with one of the undercover officers named Vince. This is detailed in the appellate judge’s interpretation of the relationship,

“As the operation continued, the appellant increasingly considered Vince to be a true friend, something he had never really had in his life. His desire to be part of the same organization as Vince, his trusted friend, gradually increased. By the time he met Mr. Big, this friendship clearly meant a lot to him”.²³¹

Vince then exploited this friendship in a coercive manner prior to Laflamme’s meeting with “Mr. Big”,

“Moreover, he was told unequivocally that Vince had taken a risk by bringing him into the Organization because if he was not accepted, Vince would probably pay a price. This was the context in which Vince gave him the following warning:

*“I said, ‘Listen, pay careful attention, because sometimes, he asks questions but he already knows the answer. So whatever happens there, the important thing is that you have to be honest’... I said, ‘Look, I gave you rave reviews. I put my head on the chopping block for you. We come in together and ... and then that’s it’”.*²³²

Subsequently, while meeting with Laflamme, “Mr. Big” reiterated that Vince’s position in the organization was determined by Laflamme’s actions:

²²⁹ *Ibid* at para. 69

²³⁰ Another incident of a staged act of violence occurred in the 29th scenario of the operation, wherein “The appellant was with Vince, who was paying a visit to a bad debtor. The appellant had to keep watch outside a motel room as he listened to Vince beating up the bad debtor. In his testimony, Vince explained that this scenario was planned to make the simulated violence credible, using blood, among other things. The undercover agent playing the role of the bad debtor had told Vince that he could give him a real punch. Vince put a bit of blood on his hand so that the appellant would see it, making the staged event appear even more serious” (para. 65).

²³¹ *Ibid* at para. 54

²³² *Ibid* at para. 76

“[M]r. Big quickly let him know in no uncertain terms that Vince's fate was tied to his acceptance in the Organization. He clearly suggested that something would happen to Vince if the appellant was not accepted into the Organization:

*“And now I consider you to be a guy like that because Vince, by bringing you there, he put his head on the block for you, you understand? If things don't work out with me and you, it's highly likely that Vince, even though I know his father and all that, he won't be able to stay with me”.*²³³

Evidently, the threats of violence against Laflamme, and his close ‘friend’ Vince, were able to intimidate Laflamme due to the violent atmosphere that had been created which resulted in a coercive influence over him.

As a result, the Quebec Court of Appeal decided that an abuse of process by way of police misconduct had occurred. Dufresne, J.A. gave the following rationale for this conclusion:

*“The coercive tactics to which the appellant was subjected cannot be tolerated. They tarnish the police investigation and throw the administration of justice into disrepute. Considerable weight and undue pressure was placed on the appellant by the combined effect of the violent treatment of Caroline even though she was a loyal collaborator of the Organization and the extremely clear connection ‘Mr. Big’ established at the beginning of his meeting with the appellant between the latter's performance in the interview -- his transparency in particular -- and the fate reserved for his friend Vince if the interview was unsatisfactory... The coerciveness of the violent episodes and the threats the undercover agents staged cannot be ignored. The behaviour of the police officers in this case is intolerable in that it compromises the integrity of the justice system and constitutes an abuse of process, the consequence of which in this case is a stay of proceedings”.*²³⁴

This ruling was the first, and only, instance since *Hart* wherein confession evidence obtained through a “Mr. Big” sting was ruled inadmissible.

Using a systems approach, it is apparent that this decision could likely affect different subsystems within the criminal justice system. First, the impact is evident within the courts subsystem as the ruling in *Laflamme* designates what constitutes an abuse of process and police

²³³ *Ibid* at para. 78

²³⁴ *Ibid* at para. 86-87

misconduct during these types of undercover operations. The guidelines set out in *Hart* are further nuanced by this decision, which outlines two specific aspects of police conduct that can be considered abusive. First, staged acts of violence against another member of the fictitious criminal organization is thought to cross the line of skillful police work and becomes intolerable police behaviour, which could ultimately compromise the integrity of the justice system. Secondly, the way in which the undercover officers took advantage of a strong relationship with a somewhat socially marginalized person by threatening the livelihood of the undercover officer involved in the relationship, is viewed as problematic. This decision could ultimately have an impact on the processes within the court subsystem, in terms of how judges determine the admissibility of confessions obtained through similar circumstances. This in turn may also affect arguments from defence counsel when challenging the admissibility of similar confessions.

The decision in *Laflamme* was also utilized in subsequent cases. In *R v. M.M.*²³⁵, the trial judge had decided, on *voir dire*, that the probative value of admitting the confession outweighed the prejudicial effect. The judge then focused on whether an abuse of process had occurred, to which the ruling in *Laflamme* was directly cited²³⁶ whereby *Laflamme* was used to justify why the undercover officer's actions in *M.M.* did not amount to an abuse of process, given that inter-organizational violence did not occur. Furthermore, in *R v. Randle*²³⁷, the decision in *Laflamme* was also cited as a justification as to why an abuse of process did not occur, as the judge ruled that the gruesome staged acts of violence, which included a staged kidnapping and murder of a

²³⁵ *R v. M.M.*, [2015] A.J. No. 1289 [*M.M.*]

²³⁶ See *Ibid* at para. 175-76.

²³⁷ *R v. Randle*, [2016] B.C.J. No. 526 [*Randle*]

police informant²³⁸, did not represent police misconduct since there was “no direct threats of force or violence against gang members”.²³⁹

Due to the interdependent relationship between subsystems within a systems approach this decision not only affects the court subsystem, but also the police subsystem. The *Laflamme* decision clearly informs the RCMP that tactics espousing inter-organizational violence will not be tolerated by the courts and future confessions obtained in this manner would likely be ruled inadmissible. The functional autonomy of the RCMP may be compromised as it could be argued that decision-making within the police organization is restricted by the decision from the court subsystem. The *Laflamme* decision may ultimately affect future planning and execution stages of the undercover operation for the RCMP given that past tactics have now been designated as an abuse of process.

IV) Confessions from a Third Party

In *R v. Tingle*²⁴⁰ the admissibility test was applied to a confession that was not given by the accused. Kenneth Tingle was charged with first-degree murder as a result of a confession made during a “Mr. Big” operation. However, the interesting feature of this case is that the confession came from a third party (Mr. Yakimchuk), and implicated Tingle as well as two others (Jonathan Dombowsky and Long Nam Luu). The RCMP enacted the undercover operation to investigate Yakimchuk for a different criminal act than the first-degree murder charge before the court in

²³⁸ *Ibid* at para. 10: “The appellant was told to stay in the vehicle as a lookout. The officers pretended to kidnap the informant and assault him in the vehicle during a short drive to a remote location. During that drive, the undercover officer posing as the person abducted urinated on himself. The other undercover officers took the ‘victim’ for a short walk to a spot where they were unseen and fired two rounds from a gun. They returned to the vehicle, having apparently shot the victim, and drove to a parking lot where they used bleach to clean their hands and then disposed of evidence. The appellant was dropped off at a hotel room”.

²³⁹ *Ibid* at para. 87

²⁴⁰ *R v. Tingle*, [2015] S.J. No. 348 [*Tingle*]

Tingle. Yet during the operation, Yakimchuk made utterances implicating the guilt of Tingle, Dombowsky, and Luu, for the first-degree murder of Isho Hana. During *voir dire*, the Crown argued that the admissibility rule developed in *Hart* does not apply to the confession in *Tingle*, as it only applies to the accused who made the confession, and that applying the new confessions rule to a statement against a third party is absurd.²⁴¹ The judge did not accept the Crown's submissions, stating:

“[*H*]art itself says it only applies to the maker of the confession. It is clear that the Supreme Court was dealing entirely with the maker of the confession in the case before it. That is because that is the use to which ‘Mr. Big’ confessions have been put. There is a target of the operation, and once information is gleaned from him or her (i.e. a confession is obtained), that information is used against the target. The underlying rationale is that it will not fall to an accused to attempt to resile from what he or she has previously confessed to... That paragraph does not limit the concept of admissibility to the maker of the confession, even though that is what the court was dealing with in *Hart* ... As well, counsel were unable to cite a single case where a ‘Mr. Big’ derived confession from the operational target was used against separately-indicted accused persons. Likewise, I was unable to locate any such case... All of the reported cases appear to deal with the maker of the confession. There has apparently been no judicial comment on the use of such confessions or statements as against third-party accused. Thus our current scenario falls outside of any substantial prior judicial contemplation”.²⁴²

As a result, the judge concluded that the common law confessions rule established in *Hart* does apply to a “Mr. Big” confession that incriminates a third party, becoming the first case to render a decision on this matter.²⁴³ Consequently, the statements made by Yakimchuk, implicating Tingle, Dombowsky and Luu, were ruled admissible as evidence.

This decision is important for two reasons. First, it sets precedent for the court subsystem going forward as the ruling signified that “Mr. Big” confession evidence that implicates a third party can be deemed admissible as long as it meets the evidentiary standard set out in *Hart*.

²⁴¹ *Ibid* at para. 85

²⁴² *Ibid* at para. 87 & 89

²⁴³ *Ibid* at para. 96

Thus, the test is not solely applicable to the maker of the confession. Secondly, the decision also acts as a form of feedback for the police subsystem. The ruling designates that proving the culpability of a suspect does not have to come directly from the confessor per se, in order for the confession to be ruled admissible. This could potentially affect the RCMP's decision making process at both the planning and execution stages such undercover operations, as the RCMP could expand the selection of possible targets for future operations to include various acquaintances of the suspect.

V) Admissible, but Not Guilty

In *R v. Streiling*²⁴⁴, Bradley Streiling was charged with second-degree murder of the 2-year old son of his girlfriend. A confession was obtained through a “Mr. Big” operation that consisted of fifty-two scenarios over the course of five months.²⁴⁵ During the undercover operation, Streiling earned \$10, 290 for completing various jobs for the organization with the opportunity to earn \$35,000 more in an upcoming job.²⁴⁶ The operation also employed a tactic where uniformed police officers visited Streiling's home and informed him of his imminent arrest and prosecution for the murder of his girlfriend's son, of which he was under suspicion.²⁴⁷ Shortly after this scenario, “Mr. Big” offered to help Streiling by providing a ‘fall guy’ who would confess to committing the crime. However, to make the story believable, “Mr. Big” requested that Streiling

²⁴⁴ *R v. Streiling*, [2015] B.C.J. No. 1618 [*Streiling*] (*Voir Dire*); *R v. Streiling*, [2015] B.C.J. No. 1619 [*Streiling II*] (Trial).

²⁴⁵ *Streiling II* *supra* note 244 at para. 31

²⁴⁶ *Ibid* at para. 33 & 35

²⁴⁷ *Ibid* at para. 38

divulge the details of the crime.²⁴⁸ Streiling then provided various details to “Mr. Big” regarding the murder of the two-year old boy, and was subsequently arrested.

At *voir dire*, the judge determined that the Crown, on a balance of probabilities, had successfully proved that the probative value of admitting the confession from the undercover operation outweighed the accompanying prejudicial effect.²⁴⁹ In reaching this decision the trial judge made a significant distinction, stating that the determination of admissibility of the confession is solely concerned with the threshold reliability of the confession.²⁵⁰ This is apparent in the reasoning provided by Power, J.,

“...at this point I do not have to determine whether the confession is true. I am solely concerned with whether the statement has sufficient reliability to justify placing it before the trier of fact; in this case, myself”.²⁵¹

Thus, the determination of ultimate reliability, or the truthfulness of the confession, would be an issue raised at trial once the confession had been ruled admissible to go before the trier of fact.²⁵²

At trial, the ultimate reliability of the confession was the central point of analysis, as the court recognized that the Crown did not have a case against Mr. Streiling without the confession,

²⁴⁸ *Ibid* at para. 40

²⁴⁹ The trial judge acknowledged that there were “troubling aspects” regarding the circumstances of the confession (*Streiling*, para. 146). More specifically, Mr. Streiling had quit his job to work for the criminal organization, in conjunction with the presence of threats and simulated violence (para. 146). However, the troubling aspects of the circumstances in the confession were offset by the markers of reliability present within the confession. In addition, the judge determined that the risk for prejudice in the case was minimal as the trier of fact in the case was judge alone (para. 19).

²⁵⁰ In *Hart*, the Supreme Court of Canada stated that the new admissibility test is “analogous” to the threshold reliability test under the principled approach to the hearsay rule (para. 100). In *Streiling*, the trial judge referenced the purpose of the admissibility test was to establish threshold reliability (or threshold admissibility, which was a term used interchangeably) (See para. 7,9,10,25,118, and 130).

²⁵¹ *Ibid* at para. 26

²⁵² As reflected in the Power, J.’s comments at trial, “By ruling on the *voir dire* that the confession Mr. Streiling made to MD was admissible at trial, I concluded that I only had to evaluate threshold and not ultimate reliability. In other words, my *voir dire* ruling held that I could consider Mr. Streiling’s confession as part of the evidence at the trial, because it exhibited sufficient indicia of reliability such that its probative value outweighed its prejudicial effect” (*Streiling II supra* note 244 at para. 90).

due to a lack of other evidence.²⁵³ When assessing the ultimate reliability of the confession, Power, J. addressed the specific markers of reliability present within the confession and compared them to medical expert testimony about the possible causes of death. In doing so, Power, J. stated,

“[W]hile I have only highlighted some aspects of the medical evidence, I have done so in order to underscore the fact that although there was a body of evidence that could be considered confirmatory of the ‘Mr. Big’ confession, when it is viewed in the context of the evidence at trial as a whole, and with Mr. Streiling’s evidence at trial, it is not sufficiently confirmatory for me to be satisfied that Mr. Streiling is guilty beyond a reasonable doubt”.²⁵⁴

When addressing the specific aspects of the “Mr. Big” operation in determining ultimate reliability, Power, J. decided,

“[T]herefore, the first and only time during the undercover operation that Mr. Streiling confessed to being involved in Noah’s death occurred when powerful inducements were brought to bear. Those included fear of dismissal from the criminal organization and fear of prosecution which he had been led to believe would almost certainly result in his conviction. He was also left with no doubt that his failure to confess would mean the loss of his future income and the lifestyle to which he was becoming accustomed. At the time that he confessed, Mr. Streiling depended completely on the criminal organization for his livelihood, since he had been encouraged to quit his full-time job, and looked forward to a “lush” lifestyle and a big payout for the upcoming job in Saskatchewan”.²⁵⁵

There were facets of the operation tactics and confession that when assessed, and compared with medical evidence and testimony of the accused, put the ultimate reliability of the confession into question. Accordingly, this case is significant as a result of the discrepancies between the decisions at the *voir dire* and the verdict given at trial. It is the first and only case since the development of the admissibility test in *Hart* to establish a confession as admissible during a *voir dire*, meeting threshold reliability, only to be ruled not to have met the ultimate reliability

²⁵³ *Ibid* para. 87

²⁵⁴ *Ibid* at para. 112

²⁵⁵ *Ibid* at para. 93

requirement at trial, and thus, resulting in a verdict of not guilty. From a systems standpoint, this decision represents indirect feedback for actors within the courts subsystem, including the Crown, defence attorneys, along with trial and appellate judges, by upholding the distinction between threshold admissibility and ultimate reliability of confession evidence from the RCMP undercover operation.

VI) *Can Prejudicial Effect Outweigh Probative Value?*

The first prong of the new admissibility test gauges whether the probative value of admitting the confession outweighs its prejudicial effect. In all 16 cases analyzed in this study, the probative value was determined to outweigh the prejudicial effect of the evidence. There are two main reasons for this outcome and the primary one was that prejudice was determined to be non-existent or very limited. When a trial proceeds by way of judge alone, it was decided that the risk for prejudice is mitigated²⁵⁶, since “a trial judge is familiar with the process of disregarding irrelevant or inadmissible evidence and does so routinely”.²⁵⁷ For these reasons, when a case involving “Mr. Big” sting evidence is heard by judge alone, the prejudicial effect of the evidence is very limited and is highly unlikely to outweigh the probative value of the confession. This is significant given that in 7 out of the 10 cases (that administered a final decision beyond the admissibility test in a *voir dire*) in this study, they were tried by judge alone.

Secondly, in cases where the trier of fact consisted of a judge and jury, there were various steps taken to limit the prejudicial effect of the confession evidence. As Superior Justice LoVecchio J. outlined in *R v. Ledesma*²⁵⁸:

²⁵⁶ *Streiling*, *supra* note 244 at para. 19; *R v. Hales*, [2014] S.J. No. 750 [*Hales*] at para. 141

²⁵⁷ *Streiling*, *supra* note 244 at para. 19

²⁵⁸ *R v. Ledesma*, [2014] A.J. No. 1468 [*Ledesma*]

“[N]eedless to say, this puts an onus on me when instructing the jury to make sure they are alive to the concerns of the Court about the faulty use of bad character evidence”.²⁵⁹

This rationale was echoed in *M.M.*, as “A limiting instruction will assist in ensuring that such evidence is not misused by the jury”.²⁶⁰ Therefore, the prejudicial effect of this evidence is diminished by efforts taken by the trial judge to properly instruct the jury regarding their assessment of the bad character evidence. Furthermore, trial judges also took steps in limiting the prejudicial effect by specifically focusing on the Crown’s presentation of “Mr. Big” evidence. In *R v. Keene*²⁶¹, the trial judge stated that the prejudicial effect could be eliminated if the Crown did not refer to specific evidence from the undercover operation that could cause moral prejudice amongst the jury.²⁶² In other cases, the prejudicial effect was limited by proactive efforts proposed by the Crown. An example of these proactive steps is evident in *M.M.*,

“[T]he Crown takes the position that the ‘Mr. Big’ statement can be put to the jury as long as certain steps are taken to manage any possible misuse of bad character evidence and therefore reduce the prejudicial effect ... the Crown has suggested removing material from the scenarios where it is highly prejudicial and not essential to the Crown’s case. As an example, the Crown suggested eliminating the entire kidnapping scenario which it submits is not essential to the narrative yet is very prejudicial to the accused”.²⁶³

Proactive steps were also taken by the Crown in *R v. Balbar*²⁶⁴, as the Crown proposed to only present three undercover scenarios to the jury, while choosing not to lead any evidence concerning the accused’s past criminal history and willingness to participate in violent scenarios during the operation.²⁶⁵ Given these findings, it seems unlikely that the prejudicial effect of “Mr. Big” evidence will outweigh its probative value in future cases, due to the knowledge possessed

²⁵⁹ *Ibid* at para. 129

²⁶⁰ *M.M.*, *supra* note 235 at para. 162

²⁶¹ *R v. Keene*, [2014] O.J. No. 6511 [*Keene*]

²⁶² *Ibid* at para. 104

²⁶³ *M.M.*, *supra* note 235 at para. 151

²⁶⁴ *R v. Balbar*, [2014] B.C.J. No. 3232 [*Balbar*]

²⁶⁵ *Ibid* at para. 371

by the trial judge and the limiting efforts made by the Crown and judges when presenting evidence to a jury.

From a systems theory perspective, the decisions regarding prejudicial effect represent a form of feedback to the different actors within the courts subsystem. Judges are well informed that reducing the prejudicial effect of “Mr. Big” sting evidence can be achieved through a proper limited instruction to the jury, so long as it adheres to the guidelines developed in *Mack*. Crown attorneys are informed that the evidence they present to a jury can be limited by a judge. The Crown also receives direct feedback recommending that they take proactive steps in reducing the prejudicial effect of the evidence they present to the jury, which can be achieved by limiting or editing²⁶⁶ the presentation of the undercover scenarios. This could be construed as influencing the functional autonomy of Crown attorneys, as they now have to prepare their cases and the presentation of evidence to restrict the prejudicial effect of the evidence. Yet, even with efforts to reduce the prejudicial effect on a jury, prejudice in these cases will certainly remain, to some extent, as stated by Arnold-Bailey J. in *Balbar*,

“[H]owever, one must not lose sight of the inescapable moral prejudice in this case ... The character of the accused is still tarnished before he steps into the witness box”.²⁶⁷

VII) Staged Violent Scenarios: Coercive to Some Targets

As the decision in *Laflamme* has stated, confession evidence obtained from undercover operations that use staged acts of violence against *another member* of the organization should be ruled inadmissible. However, there are still plenty of scenarios that use staged acts of violence and intimidation against individuals who are not members of the organization, and these appear

²⁶⁶ Either by editing audio tapes, video tapes, and/or transcripts that bare prejudicial information.

²⁶⁷ *Ibid* at para. 372

to be allowable by the courts. For instance, undercover operations have enacted scenarios involving staged kidnappings and murders of individuals who are portrayed to have slighted the criminal organization.²⁶⁸ Other scenarios have involved using physical force and threats of murder directed towards various individuals, and their partners and children, who owe money to the fictitious organization.²⁶⁹ It would seem that these forms of violence acted out in front of the suspect would have a substantial coercive effect on the suspect when faced with meeting “Mr. Big”. However, the findings from the case analysis indicate that this did not occur, as these types of staged acts of violence were deemed acceptable based on several rationales.

The first rationale accepted by the courts was that the criminal organization needed to show the suspect it was accepting of violence against women. In *Balbar*, an undercover officer testified that the violent act of assaulting and threatening to kill a woman was carried out since:

“...the offence in Project Eventail involved a violent crime against a woman scenarios were devised to test the target’s response to such crimes and to let him know that the criminal organization was engaged in violence against women when required for the overall goals of the organization, such that it would be acceptable for Mr. Balbar to speak of such things within the organization”.²⁷⁰

²⁶⁸ These violent scenarios are seen in *Randle, Allgood*, and *R v. Johnston*, [2016] B.C.J. No. 3 [*Johnston*]. A detailed example of a violent scenario of this type is evident in *Johnston*: “On July 5, 2009, Constable N. took Mr. Johnston to a cabin where the kidnap victims were purportedly being held; they were in the cabin bound with tape. Constable I. emerged from the cabin with blood on his face and hands and was angry with Constable N. for bringing Mr. Johnston with him. Constable N. stated he was going to take care of the victims and went inside the cabin. As Mr. Johnston walked away from the cabin with Constable I., Constable N. fired three shots to make it appear the victims had been killed. (Scenario no. 32) On July 7, 2009, Constable N. and Mr. Johnston went to a casino where a security video was taken with an altered date to provide an alibi for the incident at the cabin. (Scenario no. 33)” (para. 31).

²⁶⁹ This form of violence is present in *R v. West*, [2015] B.C.J. No. 1943 [*West*] and *Balbar*. In *Balbar*, “After C. verbally threatened A. with grave physical harm and indicated that he would prefer to kill her, Mr. Balbar was sent outside of the room to guard the door while in the room the undercover officers staged a scenario that contained a high level of feigned violence. Then Mr. Balbar was brought back into the room to see the distraught and beaten A., who had fake blood coming out of her mouth... Briefly, in Mr. Balbar’s presence, C. met a woman (a female undercover officer) who owed the organization money and had not paid it. He threatened to kill her and her son in front of her, having gone through her purse and taken a photo of her young son” (para. 201).

²⁷⁰ *Balbar*, *supra* note 264 at para. 184

This justification was accepted by Arnold-Bailey J. in *Balbar*, and was reiterated by the British Columbia Court of Appeal in *West*,

“[G]iven the nature of the murder being investigated, it is understandable that the police would want to create an atmosphere in which Mr. West would not be reluctant to discuss his own involvement in violence against women”.²⁷¹

The violent scenarios used in these cases²⁷² are determined as acceptable police tactics, since they are used to show that the organization is tolerant of the type of crime for which the suspect is being investigated. In *Streiling*, the judge ruled that a scenario involving a staged assault against a pregnant woman by an undercover officer who stated to the suspect that he had “...focused his attack on T.H.'s abdomen and groin, and otherwise indicated that the purpose of the attack had been to spontaneously abort T.H.'s purported pregnancy”²⁷³, was acceptable given,

“[T]he purpose of the above scenario was to show J.B. himself involved in a non-braggable offence, so as to demonstrate to Mr. Streiling that he would not be judged if he was similarly involved in such an offence”.²⁷⁴

Furthermore, the use of violent scenarios was justified as a technique to establish that an atmosphere of violence existed within the organization. This is evident in the testimony of an undercover officer in *M.M.*,

“[I]n discussing the high-impact kidnapping scenario, Moss testified that the increased level of violence used was needed to build like-mindedness with the accused. That is, if the accused was going to explain his role, if any, in the violent death of Cavanaugh, he had to believe that the officers were also individuals who believed that a high level of violence was acceptable”.²⁷⁵

²⁷¹ *West*, *supra* note 269 at para. 99

²⁷² This justification was also present in *Allgood* *supra* note 168 at para. 16.

²⁷³ *Streiling*, *supra* note 244 at para. 112

²⁷⁴ *Ibid* at para. 113

²⁷⁵ *M.M.*, *supra* note 235 at para. 172

The key rationalization of the violence scenarios is centered upon establishing a like-mindedness for violence, be it generally or specifically (i.e. against women and children), in an attempt to increase the likelihood that the suspect will discuss participating in similar forms of violence. By rationalizing the use of the violent scenarios in this way, the undercover officers, and more importantly the courts, are mitigating the coercive influence that the violent atmosphere of the organization can have on the suspect who is contemplating confessing to “Mr. Big”.

The acceptance of these justifications provides the police subsystem with indirect feedback regarding the tactics that are allowable in their undercover operations. The courts have informed the RCMP that such heinous and graphic forms of staged violence are permitted in their undercover operations, so long as they are not enacted on another member of the organization, as outlined in *Laflamme*. The RCMP’s decision-making, at both the planning and execution level, could well be influenced by the judgement made in another subsystem, as they can continue to use the same acts of extreme violence, since their rationale for doing so has been accepted by the courts. However, the coercive influence of the violent scenarios is still substantial, as stated by justice M.J. Hurler in *Allgood*:

“I do agree with Mr. Allgood’s submission that witnessing the violent scenarios showed him that the criminal organization would use violence if it was threatened or cheated”.²⁷⁶

Simply because the violent scenarios are not used against another member of the organization does not negate the threat of violence felt by a suspect, regardless of the rationale for its use stated by the undercover officers.

²⁷⁶ *Allgood*, *supra* note 169 at para. 60

VIII) Markers of Reliability Prove their Importance

Another theme prevalent throughout the case analysis was the importance placed upon markers of reliability²⁷⁷ when assessing the probative value of a confession. The assessment addressed both markers of reliability within the confession, as well as the circumstances in which the confession was made. If markers of reliability are present within the confession, these factors serve to supersede questionable and coercive circumstances (inducements and acts of violence) in which the confession was obtained. This was outlined in *Hart*,

“[T]he greater the concerns raised by the circumstances in which the confession was made, the more important it will be to find markers of reliability in the confession itself or the surrounding evidence”.²⁷⁸

This line of reasoning was upheld in a statement by Arnold-Bailey J. in *Balbar*, where he said that “strong confirmatory evidence could counterbalance weaknesses arising from the first seven factors”.²⁷⁹ The significance attributed to markers of reliability within the confession when examined in comparison to unreliable circumstances in which the confession was made is evident in *R v. Magoon*.²⁸⁰

In *Magoon*²⁸¹, strong social inducements put the reliability of the confession in question, as Mr. Jordan had become close friends with a member of the organization and had expressed how

²⁷⁷ As stated in *Hart* (para. 105) these include aspects of reliability within the confession such as confirmatory evidence, information that leads to the discovery of additional evidence, details that have not been made available to the public, or whether the confession includes mundane details (of the crime scene or the act itself) that only the true perpetrator would know.

²⁷⁸ *Hart*, *supra* note 5 at para. 105

²⁷⁹ *Balbar*, *supra* note 264 at para. 344. The seven factors that Arnold-Bailey J. is referring to include: the length of the operation, the number of interactions between the police and the accused, the nature of the relationship between the undercover officers and the accused, the nature and extent of the inducements offered, the presence of any threats, the conduct of the interrogation itself, and the personality of the accused, including his or her age, sophistication, and mental health (*Hart*, para. 102).

²⁸⁰ *R v. Magoon*, [2015] A.J. No. 607 [*Magoon*]

²⁸¹ Marie Magoon and Spencer Jordan were investigated for, and charged with, first degree murder of the biological daughter of Mr. Jordan, Meika Jordan.

much he liked everyone in the organization²⁸², while Ms. Magoon (his wife) stated that “their lives had turned around due to her friendship with Stacey and Mr. Jordan working for Johnny”.²⁸³ The financial inducements were also significant, as both Mr. Jordan and Ms. Magoon were unemployed and living out of their vehicle at the beginning of the operation²⁸⁴, which changed drastically when Mr. Jordan earned \$15,000 over 8 months working for the organization and was promised an additional payout of \$20,000 for an upcoming job.²⁸⁵ The inducements also extend beyond the social and financial factors outlined,

“...the inducement to give information pertained not only to staying in the organization, it was orchestrated that this was the only way to get Vic to help the couple stay out of jail, or get rid of the criminal charges. As well, the couple understood the organization would relocate them to Vancouver and assist in getting their children back. These circumstances, particularly the promises to help get the children back, and the pressure used half way through both interviews, go further than the cash and social inducements often seen in these operations and raise concerns about reliability of the confessions”.²⁸⁶

Yet, even in the face of “obvious powerful inducements”²⁸⁷, the markers of reliability present within the confession still proved to be more important in the determination of reliability,

“[G]iven the nature of the inducements offered by undercover police, there were real concerns about the reliability of the confessions by each accused regarding their respective roles in the victim's death. However, the confirmatory medical evidence regarding the victim's injuries, and the accused's other intercepted statements to one another, were sufficient to establish the statements by the accused had adequate probative value to be considered as evidence at trial”.²⁸⁸

²⁸² *Magoon supra*, note 280 at para. 27

²⁸³ *Ibid* at para. 28

²⁸⁴ *Ibid* at para. 30

²⁸⁵ *Ibid* at para. 16 & 32

²⁸⁶ *Ibid* at para. 75

²⁸⁷ *Ibid* at para. 72

²⁸⁸ *Ibid* at page 2

Thus, when there is confirmatory evidence present within the confession, the influence of powerful inducements in assessing reliability is diminished.

Markers of reliability also center upon details provided in the confession, including mundane details determined only to be known by the perpetrator, as in *Mildenberger*:

“[T]here are markers of reliability within the confession which lead me to find it is reliable. There is a level of detail in the confession and identification of elements of the crime, including mundane details that would not have been known to a person other than the perpetrator of the crime, which identify it as reliable”.²⁸⁹

The reliability of a confession can also be solely based on the level of detail provided by the suspect, even if there is a lack of confirmatory evidence. This was seen in *Perrault* where the judge determined that the confession²⁹⁰ “...is rife with details and explanations. It is hard to imagine how a person who did not commit the murder could give them”.²⁹¹ The markers of reliability were not based on confirmatory evidence or evidence only known to the perpetrator, but rather on how ‘precise’ the details were.²⁹²

The decisions in the cases in this analysis confirm that when assessing probative value the markers of reliability in a confession are to be given more significance than the unreliable circumstances in which the confession was gained. This was recognized in *Mack*, where the court held that “the existence of various forms of confirmatory evidence made the statement

²⁸⁹ *Mildenberger supra* note 169 at para. 80

²⁹⁰ *Perrault, supra* note 212 at para. 67: “The appellant precisely described how he got rid of the body without being seen in an environment consisting of an apartment building surrounded by neighbours. He backed the car up to the window of his apartment. He was under a balcony and there were cars parked on each side. He wrapped the body in a blanket and got it out through the window of the apartment”.

²⁹¹ *Ibid* at para. 66

²⁹² *Ibid* at para. 68

given by the target highly probative”.²⁹³ Systematically, this determination acts as direct feedback for actors in both the courts and police subsystems. For the courts, this reasoning may affect future assessments regarding how the probative value of confession evidence is weighed against its prejudicial effect. Moreover, this feedback could directly affect the types of tactics used in future operations within the police subsystem. The RCMP could ostensibly develop new tactics that are specifically focused on obtaining markers of reliability, including details of the crime scene, a potential weapon, and the location of the deceased, which could lead to a higher conviction rate in these cases.

Conclusion

The results from the case analysis illustrate the initial impact that the new admissibility test has had since it was developed in *Hart*. The original rule has been further articulated in *Mack*, which informs trial judges on how to properly instruct a jury regarding the reliability and prejudicial concerns that are attached to confession evidence from a “Mr. Big” sting. Undercover tactics involving violence or intimidation against another member of the criminal organization were deemed by the courts to be unacceptable police tactics that amount to an abuse of process, while all other violent scenarios used by undercover officers in the remaining fifteen cases did not. The importance of the presence of markers of reliability within a confession were acknowledged, while evidence from the undercover operation was determined to not produce a significant prejudicial effect on the trier of fact in all of the cases in this analysis. The systems analysis illustrated how the different actors within the courts and police subsystems are specifically affected by the courts’ interpretation of the new admissibility test. However, it is difficult to ascertain if the impact reached the desired effect sought when the rule was developed,

²⁹³ *Mack*, *supra* note 171 at para. 34

which was to provide sufficient protections to accused persons who confess during “Mr. Big” operations.²⁹⁴

²⁹⁴ *Hart supra* note 5 at page 5.

CHAPTER 6

Concluding Remarks

Introduction

There has been a gap in the literature concerning the “Mr. Big” sting since the landmark decision in *Hart* occurred, as the influence of the new evidentiary rule on cases since the decision had not been explored. This project sought to contribute to the literature in this way, by conducting a qualitative content analysis of all the cases that have occurred directly after *Hart* (July, 2014) to April 2016, which provided a sample size of sixteen cases. The findings from this analysis were highlighted in the previous chapter, and were also examined using a functional systems approach, which illustrated how the different components of the criminal justice system were affected by the *Hart* decision and the subsequent outcomes of the cases in this analysis. In conjunction with the findings that were gained from the examination of the application of the new admissibility test, one case in particular provided more insight into the influence of the evidentiary rule on the RCMP’s operational planning.

Evidence of Change? *R v. Balbar*

In *Balbar*, Staff Sgt. Mann, who was in charge of the undercover operations for the E division (British Columbia), was called to give testimony regarding the procedures followed by the RCMP when conducting a “Mr. Big” sting.²⁹⁵ Staff Sgt. Mann offered numerous insights into the typical undercover operation procedures, for instance,

“[I]n cross-examination...He agreed that having the evidence gathered in Mr. Big investigations become presumptively inadmissible represented a big change, resulting in more focus on compliance with the guidelines set out in *Hart*. He agreed with suggestions by defence counsel that it would be preferable that undercover officers

²⁹⁵ *Balbar*, *supra* note 264 at para. 142

involved in these types of operations not engage in explicitly racist, misogynistic and pornographic comments as they did in this operation”.²⁹⁶

The RCMP’s compliance with the guidelines set out in *Hart* is apparent in Staff Sgt. Mann’s statements concerning the emphasis placed on particular aspects of the operation,

“...certain scenarios, including those that use large amounts of cash, weapons, expensive commodities, and high risk scenarios, including any with purported threats of violence or simulated actual violence, all come to him for review, and now go up the chain of command to the inspector above him for approval. Since the *Hart* decision there is a heightened review of operational plans for proposed Mr. Big investigations and more emphasis is put on the profile of the target”.²⁹⁷

“[R]egarding possible Mr. Big targets and their mental health issues, Staff Sgt. Mann indicated that the "goal posts are different now"...in the last two years a much more detailed profile of a prospective target must be prepared that contains 45 to 50 questions to be answered. The investigators are required to delve deeper into the questions of mental health and other aspects of a suspect's background... In terms of the scenarios that involve the threat of violence, Staff Sgt. Mann agreed that this has been "dialed down" in Mr. Big operations”.²⁹⁸

This would indicate that the new admissibility test has directly affected the operational plans of these undercover operations in order to adhere to the guidelines administered by the courts. An example of this influence was also acknowledged by Arnold-Bailey J.,

“[T]he evidence in this *voir dire* shows that the police are giving more consideration these days to the nature of the target and the activities in scenarios including those using feigned violence, presumably to fend off a finding of abuse of process”.²⁹⁹

Prior to *Hart*, the operational plan when conducting a MBS did not require the degree of approval that is now said to be required.³⁰⁰ According to officer testimony in this case, the

²⁹⁶ *Ibid* at para. 154

²⁹⁷ *Ibid* at para. 152

²⁹⁸ *Ibid* at para. 155 & 157

²⁹⁹ *Ibid* at para. 191

RCMP has shifted its operational plans to include a more detailed profile of the target in an effort to account for potential vulnerabilities that could render a confession unreliable, while also ‘dialing down’ the intensity and threat of violence used in the undercover operation.

From a systems perspective, the interdependent relationship between police and courts subsystems indicate that the courts have directly influenced (by way of the admissibility test) the operations and functional autonomy of the police (undercover operation procedures). This influence is directly recognized by Staff Sgt. Mann in his testimony,

“...the ‘Mr. Big’ technique has evolved over the years and that the courts guide the actions of the police through case law ... they want to make sure they are responsive to court decisions”.³⁰¹

Moreover, the *Hart* decision has also influenced how the RCMP define what a successful undercover operation entails, as recognized by Arnold-Bailey J.,

“...the Court has the clear sense that the definition of a successful case had only recently acquired the nuance that the technique exonerated the innocent. The vast majority of past successes were defined as gathering sufficient evidence to send a case to trial. The spectre of a false confession that could lead to a wrongful conviction remains alive and to be guarded against on a case by case basis”.³⁰²

Thus, through the avenues of officer testimony and the judge’s analysis of this testimony, *Balbar* illustrates the tangible effect that the new admissibility rule has had on the functional autonomy and operations within the RCMP’s undercover division when planning and conducting a “Mr. Big” sting. However, Sgt. Mann’s testimony must be treated cautiously in terms of the degree to which it represents a reliable account of change within the procedures of RCMP undercover operations. In order to ascertain that such procedures have really changed, one would need

³⁰⁰ *Ibid* at para. 144, as stated by Staff Sgt. Mann

³⁰¹ *Ibid* at para. 147

³⁰² *Ibid* at para. 190

access to the operational procedures that take place when a “Mr. Big” sting is carried out³⁰³, rather than solely relying on officer testimony.

The Impact of *R v. Hart*

In the qualitative content analysis conducted in this study certain cases illustrated (to varying degrees) the impact of the new admissibility test since it was developed. *Balbar* demonstrated how the operational standards and procedures used when administering a “Mr. Big” sting have been altered. Cases such as *Mack* introduced new guidelines for trial judges to adhere to when instructing the jury on evidence from the undercover operation, whereas *Perrault* ordered a new trial after applying these guidelines and finding the jury instructions to be inadequate. *Laflamme* was the first and only case to rule a confession inadmissible, since the undercover officer’s actions constituted an abuse of process. This decision deemed that the tactic of enacting violent scenarios on other members of the organization was unacceptable police conduct. Further, all of the cases in this analysis ruled that the prejudicial effect did not outweigh the probative value of admitting the confession evidence. This was due in part to the different steps taken that attempted to limit the prejudicial effect of the evidence on the trier of fact.

The impact of the new evidentiary rule could be understood through a systems approach. The two-pronged admissibility test acted as a form of feedback dictated by the courts subsystem that influenced other actors within the court and police subsystems. Proper (and improper³⁰⁴) jury instruction procedures, along with evidence as to what actions by undercover officers constitute an abuse of process have been established. Trial judges have also been made aware of the

³⁰³ Based on personal experience of being denied access to interview RCMP officers about this undercover operation, it is highly unlikely (even next to impossible) that this access would be granted.

³⁰⁴ *Perrault*, *supra* note 212 at para. 100

significance placed on the markers of reliability in a confession, even when unreliable circumstances are present. Juries in these cases have received instructions and are likely better equipped to make judgments regarding the ultimate reliability of a “Mr. Big” confession. Crown attorneys must prove to the courts that the probative value of admitting the evidence outweighs its prejudicial effect. Defence attorneys are responsible for proving that an abuse of process has occurred, if they so choose to raise that argument.

The most significant impact evident from the analysis appears to have occurred within the police subsystem. The courts have specified to the RCMP the techniques that are no longer permitted if a confession is to be deemed admissible. The RCMP can now enact a “Mr. Big” operation on a third-party suspect and any confession gained could potentially be ruled admissible. Furthermore, a trend present in several cases indicated the crucial role of confirmatory evidence in deeming these confessions admissible, which could serve to alter the tactics the RCMP employs during these operations.

Despite some progress created by the new evidentiary rule in terms of applying more stringent criteria to the admissibility of these confessions, this research project has revealed that little has changed. In five of the seven cases heard on appeal where a conviction was maintained after applying the new admissibility test, it was acknowledged that trial judges had mostly followed the essential aspects of the new evidentiary rule in their decision.³⁰⁵ In regards to violence used in these operations, only scenarios using violence against other members of the organization were deemed to be unacceptable, while all other forms of staged violence, which involve tactics that have frequently been deemed coercive, were accepted by the courts. Moreover, even when there are troublesome aspects present within the circumstances of the

³⁰⁵ In *Allgood*, it was determined that the trial judge “essentially followed the roadmap subsequently set out in *Hart*” (para. 4). This sentiment was also expressed in *Randle*.

operation including the coercive and manipulative influence of inducements and threats of violence or intimidation, this analysis has demonstrated that when markers of reliability are present *within the confession* they will likely outweigh any of the problems present in the *circumstances surrounding the confession*.

Overall, the analysis undertaken in this study has revealed some improvement in terms of addressing some of the problematic issues that can be present in the tactics of a “Mr. Big” operation. At the same time, given the Supreme Court of Canada’s main objective in *Hart* was to protect those who confess during a “Mr. Big” sting, the results of this analysis show that great strides have not been taken towards achieving this goal.

Limitations

The main limitation of this study is centered upon issues of timing as the data were only comprised only of cases that took place two years after the *Hart* decision (from 2014 to 2016). In total only sixteen cases were analyzed, and of those sixteen only three showed the results from both the *voir dire* and the trial outcome. Thus, the results in regards to how the court and police subsystem were influence by *Hart* are preliminary. However, these results paint an initial picture as to what the impact of the new evidentiary rule has been thus far. At the same time, future studies incorporating larger samples of cases may build upon this project to provide a further nuanced account of the impact of the new admissibility test.

A second limitation of this study is also a result of the data set that was used as the data came from judicial decisions, whereby the use of official transcripts from the court decisions could have revealed more. Transcripts may have provided more information in regards to the court’s interpretation of the two-pronged test, or may have given more insight to how the test has

influenced operations within the police, as was made evident in *Balbar*. As previously stated, acquiring the official transcripts was beyond the scope of this study, due to the cost of obtaining official transcripts. Yet, the data used in this study still provided some insights regarding the impact that the decision in *Hart* has had on the different actors within criminal justice.

Lastly, it has been stated that empirical research in the social science realm should be driven, or at least informed, by theory (Abend, 2008). Clearly, this study did not take an approach that was guided by theory. Rather the approach used in this study was mostly dictated by the nature of the subject matter being analyzed, which addressed a new common law rule of evidence. It was deemed more appropriate to take a pragmatic approach that would highlight how the different actors involved, in some way, with “Mr. Big” confession evidence were potentially affected by *Hart*.

Future Directions

The current study aimed to contribute to the literature concerning the use of “Mr. Big” confession evidence, which was achieved with an analysis of the impact of the new admissibility test in *Hart*. There remains a need for future research to build upon the findings gained in this project by using the systematic methodological approach to further explore the influence in which the new two-pronged test has had on cases beyond the ones analyzed in this study. A larger sample size will allow for a more clear and definitive explanation of the level of impact brought on by the new evidentiary rule from *Hart*, expanding upon the knowledge gained from this study.

It would be of interest to explore future decisions pertaining to the violent scenarios used in these operations in order to see if and when they will be deemed unacceptable. It would be interesting to explore the role of jury instruction guidelines in future appeal cases, as both cases in this study that reviewed the trial judge's instructions deemed the instructions to be inadequate. Additionally, it would be important to examine whether the prejudicial effect of such confessions will ever outweigh the probative value, as it was determined to be very unlikely based on the findings from the current analysis. Lastly, exploration of whether the presence of markers of reliability within the confession will continue to outweigh coercive and manipulative circumstances in which the confession was obtained, as confirmatory evidence trumped powerful inducements and threats of violence in the cases analyzed in this study. In this regard, the call for future research in these areas is necessary, as the current project has only produced preliminary findings.

A recent case underscores the importance of future research. In *R v. Worme*³⁰⁶, a new trial was ordered on appeal after an examination of an undercover officer's testimony deemed the testimony to be problematic. The officers testified that the scenarios used in a "Mr. Big" sting were designed to obtain the "purest most truthful statements...and guarded against made up stories of any kind".³⁰⁷ The problem with this testimony is that it gave assurances to the jury that the confession from the operation was both credible and reliable, in which "...it is entirely reasonable to assume that in deciding whether to believe the confession the jury would be influenced, if not persuaded, by this assurance"³⁰⁸. The decision to order a new trial brought with it a determination that this form of police testimony is not acceptable, while also stating that defence counsel can now challenge the effectiveness of the "Mr. Big" operation on cross-

³⁰⁶ *R v. Worme*, [2016] A.J. No. 582 [*Worme*]

³⁰⁷ *Ibid* at para. 24

³⁰⁸ *Ibid*

examination.³⁰⁹ This decision demonstrates another way in which the court subsystem has reinforced the caution of accepting “Mr. Big” confession evidence as was done in *Hart*.

In the aftermath of *Hart*, the Association in Defence of the Wrongfully Convicted (AIDWYC), which is now known as Innocence Canada, held a press conference calling then justice minister Peter McKay to conduct a comprehensive ministerial review of all convictions that occurred as a result of “Mr. Big” confession evidence.³¹⁰ However, in the near three years since this press conference a ministerial review has not taken place. It will be interesting to see whether a ministerial review will ever occur and the potential outcomes that such a review could produce. Moreover, attention should be given to the outcomes of any section 696.1 criminal conviction review applications that are made based on the use of “Mr. Big” confession evidence, and whether the new admissibility test plays a role in producing successful applications.

Conclusion

It is evident that the courts’ thinking in regards to “Mr. Big” operations has changed with the decision in *Hart*³¹¹ as these confessions are now presumptively inadmissible. This change in perception, and the impact that resulted was made evident in some of the cases analyzed in this research project, in particular *Mack*, *Perrault*, and *Laflamme*. Yet, this change was not so apparent in other cases where the majority of violent scenarios used were accepted or the prejudicial effect of “Mr. Big” evidence was downplayed. Accordingly, this research project has uncovered these patterns of progress and stagnation in regards to the acceptance of “Mr. Big” confession evidence, and the resulting impact that this has had on the different actors within

³⁰⁹ *Ibid* at para. 141

³¹⁰ Dias, D. (2014, August 14th). Canadian Lawyers & Law Times: *AIDWYC wants audit for all Mr. Big convictions*.

³¹¹ *Worme supra* note 306 at para. 17

criminal justice. As these findings are preliminary in nature, it is paramount to build upon this study in order to gain a more concrete understanding of the impact that the decision in *Hart* will have on future “Mr. Big” operations, and the confessions obtained from them.

Bibliography

- Abend, G. (2008). The meaning of theory. *Sociological Theory*, 26 (2), 173-199.
- Ayling, C.J. (1984). Corroborating confessions: an empirical analysis of legal safeguards against false confessions. *Wisconsin Law Review*, 4, 1121–1204.
- Bauer, M.W., & Gaskell, G. (2000). Classical content analysis: A review. In Martin Bauer & George Gaskell (Eds.), *Qualitative Researching with Text, Image and Sound* (pp.132-152), London: Sage Publications.
- Berelson, B. (1952). *Content Analysis in Communication Research*. New York: Free Press.
- Bernard, T.J., Paoline III, E.A., & Pare, P-P. (2005). General systems theory and criminal justice. *Journal of Criminal Justice*, 33, 203-211.
- Bertalanffy, L. V. (1968). *General system theory: Foundations, development, applications*. New York: George Braziller, Inc.
- Bertalanffy, L. V. (1975). *Perspectives on general system theory: Scientific-philosophical studies*. New York: George Braziller, Inc.
- Blumstein, A.R. (1972). Systems analysis of crime control and the criminal justice system. In M.D. Mesarovic and A. Reisman (eds.), *Systems Approach and the City*. Amsterdam: North-Holland Publishing.
- Bochner, A. (2000). Criteria against ourselves. *Qualitative Inquiry*, 6, 266-272.
- Botha, E.M. (1989). Theory development in perspective: the role of conceptual frameworks and models in theory development. *Journal of Advanced Nursing*, 14(1), 49-55.
- Boyatzis, R. E. (1998). *Transforming qualitative information: Thematic analysis and cod development*. Thousand Oaks, CA: Sage Publications.
- Boydell, C., & Connidis, I. (1995). A social systems approach to criminal justice research: An overview. In N. Larsen, *The Canadian Criminal Justice System: An Issues Approach to the Administration of Justice*. Canadian Scholars Press.
- Burke, T. (Director/Producer). (January 21st, 2009). *Someone got away with murder*. Toronto, ON: Canadian Broadcasting Corporation.
- Burns, T. (Director). (2007). *Mr. Big* [Documentary]. Canada: Atlas Grove Entertainment.
- Cassell, P., Hayman, B. (1996). Police interrogation in the 1990s: An empirical study of the effects of Miranda. *UCLA Law Review*, 43, 839 –931.

- Catanese, A.J., & Steiss, A.W. (1970). *Systematic planning: Theory and application*. Toronto: D.C. Heath & Co.
- Canadian Charter of Rights and Freedoms*, Part I of The Constitution Act, 1982, Enacted as Schedule B to the Canada Act 1982, (U.K.) 1982, c. 11.
- Cole, G.F. (1975). *The American system of criminal justice*. North Scituate, Mass.: Daxbury Press.
- Connidis, I. (1982). *Rethinking criminal justice research: A systems perspective*. Holt, Rinehart and Winston of Canada, Limited.
- Cortes, F., Przeworski, A., & Sprague, J. (1974). *Systems analysis for social scientists*. Toronto: John Wiley and Sons.
- Dawson, W.J. (1977). The need for systems approach to justice administration. In D.T. Shanahan, *The Administration of Justice System: An Introduction*. Boston: Holbrook Press.
- Davis, D., & Leo, R. (2006) Strategies for preventing false confessions and their consequences, in Kebbell, M., & Davies, G. (Eds.), *Practical Psychology for Forensic Investigations and Prosecutions*, 121– 49, New York: John Wiley & Sons.
- Dias, D. (2014, August 14th). AIDWYC wants audit for all Mr. Big convictions. *The Blog of Canadian Lawyer & Law Times*. Retrieved from: <http://www.Canadianlawyermag.com/legalfeeds/223/aidwyc-wants-audit-for-all-mr-big-convictions.html>
- Drizin, S., and R. Leo. 2004. The Problem of False Confessions in the Post-DNA World. *North Carolina Law Review*, 82 (3), 892–1007.
- Dufraimont, L. (2008). The common law confessions rule in the charter era: Current law and future directions. *Supreme Court Law Review*, 40, 249-269.
- Ellis, J., & Luckasson, R. (1985). Developmentally disabled defendants. *George Washington Law Review*, 53, 414 –493.
- Emery, F.E., & Trist, E.L. (1969). The causal texture of organizational environments. In F.E. Emery (eds.), *Systems Thinking Selected Readings*. England: Penguin Books.
- Feeley, M.M. (1973). Two models of the criminal justice system: An organizational perspective. *Law and Society Review*, 7 (3), 407-425.
- Garrett, B. (2008). Judging innocence. *Columbia Law Review*, 108 (1), 55–142.
- Gibbs, G. (2007). *Analyzing Qualitative Data*. London: Sage Publications.

- Golafshani, N. (2003). Understanding reliability and validity in qualitative research. *The Qualitative Report*, 8 (4), 597-607.
- Goldstein, H. (1968). Trial judges and the police: Their relations in the administration of criminal justice. *Crime and Delinquency*, 14 (1), 14-24.
- Goldstein, H. (1993). Confronting the complexity of the policing function. In L.E. Ohlin & F.J. Remington, *Discretion in Criminal Justice*, Albany: State University of New York Press.
- Gouldner, A.J. (1967). Reciprocity and autonomy in functional theory. In N.J. Demerath III & R.A. Peterson (eds.), *System, Change and Conflict*. New York: The Free Press.
- Gudjonsson, G.H. (2003). *The psychology of interrogations and confessions: A handbook*. West Sussex: Wiley.
- Hagen, E.E. (1961). Analytical models in the study of social systems. *American Journal of Sociology*, 67 (2), 144-151.
- Hartwig, M., Granhag, P.A., & Vrij, A. (2005). Police interrogation from a social psychology perspective. *Policing and Society*, 15 (4), 379-399.
- Holsti, O.R. (1969). *Content analysis for the social sciences and humanities*. Reading, MA: Addison-Wesley.
- Hsieh, H-F., & Shannon, S.E. (2005). Three approaches to qualitative content analysis. *Qualitative Health Research*, 15 (9), 1277-1288.
- Ibrahim v. The King*, [1914] A.C. 599
- Inbau, F.E., Reid, J.E. & Buckley, J.P. (1986), *Criminal Interrogation and Confessions*, Baltimore, MD: Williams & Walkins.
- Inbau, F.E., Reid, J.E., Buckley, J.P. & Jayne, B.C. (2001), *Criminal Interrogation and Confessions*, Gaithersburg, MD: Aspen
- Kaplan, A. (1943). Content analysis and the theory of signs. *Philosophy of Science*, 10, 230-47.
- Kassin, S. M. (2006). Internalized false confessions. In Toglia, M.P., Read, D.J., Ross D.F., Lindsay, R. C. L. (Eds.), *Handbook of eyewitness psychology*, 175-194, New Jersey: Lawrence Erlbaum Associates Publishers.
- Kassin, S.M. (2008). False confessions: Causes, consequences and implications for reform. *Current Issues in Psychological Science*, 17 (4), 249-253.
- Kassin, S.M., & Kiechel, K.L. (1996). The social psychology of false confessions: Compliance, internalization, and confabulation. *Psychological Science*, 7, 125-128.

- Kassin, S.M., & Wrightsman, L.S. (1985). Confession evidence. In S. Kassin & L. Wrightsman (Eds.), *The Psychology of Evidence and Trial Procedure*, 67–94, Beverly Hills, CA: Sage.
- Kast, F. E., & Rosenzweig, J. E. (1972). General systems theory: Applications for Organization and Management. *Academy of Management Journal*, 15 (4), 447-465.
- Keenan, K., & Brockman, J. (2010). *Mr. Big: Exposing undercover investigations in Canada*. Nova Scotia: Fernwood Publishing.
- Khoday, A. (2013). Scrutinizing Mr. Big: Police trickery, the confessions rule and the need to regulate extra-custodial undercover interrogations. *Criminal Law Quarterly*, 60, 277- 300.
- Kraska, P. (2006). Criminal justice theory: Toward legitimacy and an infrastructure. *Justice Quarterly*, 23(2), 167-185.
- Krippendorff, K. (1980). *Content analysis: An introduction to its methodology*. Beverly Hills, CA: Sage Publications.
- Krippendorff, K. (2004). *Content analysis: An introduction to its methodology (2nd ed.)*. Thousand Oaks, CA: Sage Publications
- Kuhn, A. (1971). Types of social systems and system controls. In M.D. Rubin (eds.), *Man in Systems*. New York: Gordon & Breach Science Publishers.
- Kuhn, A. (1974). *The logic of social systems*. San Francisco: Jossey-Bass Publications.
- Laflamme v. R.*, [2015] Q.J. No. 8925
- Leo, R.A. (1994). Police interrogation in America: A study of violence, civility and social change. *Unpublished Ph.D. dissertation*, University of California, Berkeley.
- Leo, R.A. (2009). False confessions: Causes, consequences, and implications. *American Academy of Psychiatry and Law*, 37, 332-343.
- Leo, R.A. & Ofshe, R.J. (1998). The consequences of false confessions: deprivations of liberty and miscarriages of justice in the age of psychological interrogation. *Journal of Criminal Law and Criminology*, 88, 429–496
- Lincoln, Y.S., & Guba, E.G. (1985). *Naturalistic inquiry*. Beverley Hills: Sage.
- Maguire, E. R., Howard, G. H., & Newman, G. (1998). Measuring the performance of national criminal justice systems. *International Journal of Comparative and Applied Criminal Justice*, 22, 31– 59.
- Mayring, P. (2000). *Qualitative content analysis*. Forum: Qualitative Social Research, 1(2), Art. 20.

- Mayring, P. (2014). *Qualitative content analysis: theoretical foundation, basic procedures and software solution*. Austria: SSOAR.
- McCann, J. (1998). A conceptual framework for identifying various types of false confessions. *Behavioural Sciences and the Law*, 16, 441-453.
- Memon, A., Vrij, A. & Bull, R. (2003). *Psychology and Law: Truthfulness, Accuracy and Credibility* (2nd eds.). Chichester: Wiley.
- Moore, M.D. (1976). A normative model for law enforcement in the criminal justice system. *Journal of Police Science and Administration*, 4 (1), 71-81.
- Moore, T., Copeland, P., & Schuller, A. (2009). Deceit, betrayal and the search for truth: Legal and psychological perspectives on the Mr. Big strategy. *Criminal Law Quarterly*, 55, 348-404.
- Myren, R.A. (1976). Study of federated criminal justice systems: Research needs. *Criminal Justice Review*, 1(1), 1-10.
- Newman, D.J. (1975). *Introduction to criminal justice*. Philadelphia: J.B. Lippincott Co.
- Nowlin, C. (2004). Excluding the post offence undercover operation from evidence: ‘Warts’ and all. *Canadian Criminal Law Review*, 8, 382-414.
- Ofshe, R. (1989). Coerced confessions: the logic of seemingly irrational action. *Cultic Studies Journal*, 6, 1-15.
- Ofshe, R.J., & Leo, R.A. (1997a). The decision to confess falsely: rational choice and irrational action. *Denver University Law Review*, 74, 979-1122
- Ofshe, R.J. & Leo, R.A. (1997b). The social psychology of police interrogation. The theory and classification of true and false confessions. *Studies in Law, Politics and Society*, 16, 189-251
- O’Leary V., & Newman, D.J. (1970). Conflict resolution in criminal justice. *Journal of research in crime and delinquency*, 7 (1), 99-119.
- Owen-Kostelnik, J., Reppucci, N., Meyer, J. (2006). Testimony and interrogation of minors: assumptions about maturity and morality. *American Psychologist*, 4, 286–304.
- Perreault v. R.*, [2015] Q.J. No. 3389
- Potter, W. J., & Levine-Donnerstein, D. (1999). Rethinking validity and reliability in content analysis. *Journal of Applied Communication Research*, 27, 258-284.
- Poloz, A. (2015). Motive to lie? A critical look at the Mr. Big investigative technique. *Canadian Criminal Law Review*, 19, 231- 251.

Puddister, K., & Riddell, T. (2012). The RCMP's "Mr. Big" sting operation: A case study in police independence, accountability and oversight. *Canadian Public Administration*, 55 (3), 385-409.

Prosko v. The King [1922], 63 S.C.R. 226

R v. Allgood, [2015] S.J. No. 387

R v. Balbar, [2014] B.C.J. No. 3232

R v. Boudreau, [1949] S.C.R. 262

R v. Brydon, [1983] B.C.J. No. 1614

R v. Chapple, [2012] A.J. No. 881

R v. Ciancio, [2006] B.C.J. No. 2926

R v. Collins, [1987] S.C.J. No. 15

R v. Creek, [1998] B.C.J. No. 3189 (S.C.)

R. v. Cretney, [1999] B.C.J. No. 2875 (S.C.)

R v. Evans, [1996] B.C.J. No. 3141 (S.C.)

R v. Fitton, [1956] S.C.R. 958

R v. Fliss, [2002] 1 S.C.R. 535

R v. Grandinetti, [2005] 1 S.C.R. 27

R v. Handy, [2002] 2 S.C.R. 908

R v. Hales, [2014] S.J. No. 750

R. v. Hart, [2012] N.J. No. 303 (C.A.)

R v. Hart [2014] S.C.J. No. 52

R. v. Hathway [2007] S.J. No. 245 (Q.B.)

R v. Hebert, [1990] S.C.J. No. 64

R v. Hodgson, [1998] 2 S.C.R. 449

R v. Johnston [2016], B.C.J. No. 3
R v. Keene, [2014] O.J. No. 6511
R v. Ledesma, [2014] A.J. No. 1468
R v. Mack, [2014] S.C.J No. 58
R v. Magoon, [2015] A.J. No. 607
R v. McIntyre, [1993] N.B.J No. 293 (C.A.)
R v. McIntyre, [1994] 2 S.C.R 480
R. v. Mentuck, [2000] M.J. No. 447 (Q.B.)
R v. Mildenberger, [2015] S.J. No. 515
R v. Moore, [1997] B.C.J No. 1569 (Q.B.)
R v. M.M., [2015] A.J. No. 1289
R. v. O.N.E. [2000] B.C.J. No. 1922 (S.C.)
R v. Oickle, [2000] S.C.J No. 38
R v. Osmar, [2007] O.J No. 244 (C.A.)
R v Phillion, [2009] O.J. No. 202 (C.A.)
R v. Randle, [2016] B.C.J. No. 526
R v. Rothman, [1981] 1 S.C.R. 640
R v. Streiling, [2015] B.C.J. No. 1618
R v. Streiling, [2015] B.C.J. No. 1619
R v. Tingle, [2015] S.J. No. 348
R v. Unger, [1993] M.J. No. 363 (C.A.)
R v. West, [2015] B.C.J. No. 1943
R v. Worme, [2016] A.J. No. 582

- Rapoport, A. (1986). *General systems theory: Essential concepts and applications*. Cambridge, MA: Abacus Press.
- Redlich, A. (2004). Mental illness, police interrogations, and the potential for false confession. *Law Psychiatry*, 55, 19 –21.
- Reich, R.B. (1973). Operations research and criminal justice. *Journal of Public Law*, 22,357-387.
- Reiss, A.J. (1971). *The police and the public*. New Haven: Yale University Press.
- Royal Canadian Mounted Police Act (R.S.C., 1985, c. R-10). Retrieved from Justice Laws Website: <http://laws-lois.justice.gc.ca/eng/acts/R-10/index.html>
- Salas, C. (2004). The case for excluding confessions of the mentally ill. *Yale J. L. & Human*, 16, 243–275.
- Samuel, G. (2013). *A short introduction to the common law*. Cheltenham: Edward Elgar Publishing Limited
- Schreier, M. (2012). *Qualitative content analysis in practice*. London: Sage Publications.
- Schreier, M. (2014). Qualitative content analysis. In Uwe Flick (Eds.), *The Sage Handbook of Qualitative Data Analysis* (pp.170-184), London: Sage Publications.
- Seale, C. (1999). Quality in qualitative research. *Qualitative Inquiry*, 5 (4), 465-478.
- Shapo, H.S., Walter, M.R., & Fajans, E. (2013). *Writing and analysis in law* (6 eds.). St. Paul: Foundation Press.
- Skolnick, W.G. (1975). *Justice without trail: Law enforcement in democratic society*. New York: John Wiley and Sons Inc.
- Smith, S., Stinson, V., & Patry, M. (2009). Using the Mr. Big technique to elicit confessions: Successful innovation or dangerous development in the Canadian legal system? *Psychology, Public Policy and Law*, 15 (3), 168-193.
- Sopinka, J., Lederman, S.N., & Bryant, A.W. (1999). *The Law of Evidence in Canada* (2 eds.). Toronto: Buttersworth.
- Stone, P.J., Dunphy, D.C., Smith, M.S. and Ogilvie, D.M. (1966). *The General Inquirer: A computer approach to content analysis*. Cambridge, MA: MIT Press.
- Sukkau, E., & Brockman, J. (2015). “Boys, you should all be in Hollywood”: Perspectives on the Mr. Big investigative technique. *UBC Law Review*, 48 (1), 47-77.

- Sutherland, J.W. (1973). *A general systems philosophy for the social and behavioural sciences*. New York: George Braziller.
- Tracy, S.J. (2010). Qualitative quality: Eight “big tent” criteria for excellent qualitative research. *Qualitative Inquiry*, 16 (10), 837-851.
- Turk, A.T. (1977). Class, conflict, and criminalization. *Sociological Focus*, 10(3), 209-220.
- Unger v. Canada* (Minister of Justice), [2005] M.J. No. 414
- Vesely, A. (2017). Policy advice as policy work: A conceptual framework for multi-level analysis. *Policy Sci*, 50, 139-154.
- Walker, S. (1998). *Popular Justice: A History of American Criminal Justice* (eds. 2). Oxford, UK: Oxford University Press.

Appendices

Appendix A: Coding Frame

<u>Case</u>	<u>Type of Crime Committed</u>	<u>Level of Court</u>
R v. _____	<u>Crime:</u>	<u>Voir Dire:</u> • Yes • No <u>Trial:</u> • Yes • No • With Jury • Without Jury <u>Court of Appeal:</u> • Yes • No <u>Supreme Court of Canada:</u> • Yes • No

Result
1. <u>MBS evidence ruled admissible in Voir Dire:</u> • Yes • No a) <u>Rationale Given:</u>
2. <u>Trial Verdict:</u> • Guilty • Not Guilty a) <u>Rationale Given:</u>
3. <u>Court of Appeal Verdict:</u> • Appeal Granted • Appeal Dismissed a) <u>Rationale Given:</u>
4. <u>Supreme Court of Canada:</u> • Appeal Granted • Appeal Dismissed a) <u>Rationale Given:</u>

Probative Value (Reliability): Circumstances in which confession was made
Inducements
1. <u>Financial inducements determined to be significant:</u> • Yes • No c) <u>If Yes, rationale given:</u> d) <u>If No, rationale given:</u> 2. <u>Social inducements determined to be significant:</u> • Yes • No c) <u>If yes, rationale given:</u> d) <u>If No, rationale given:</u> 3. <u>Other inducements determined to be significant:</u> • Yes • No c) <u>If yes, rationale given:</u> d) <u>If no, rationale given:</u>
[SUB] <u>Extent of Financial Inducement Present:</u> [SUB] <u>Financial situation of the suspect:</u> [SUB] <u>Extent of Social Inducement Present:</u> [SUB] <u>Social Composition of the suspect:</u> [SUB] <u>Nature of 'Other' Inducement Present:</u>

Probative Value (Reliability): Circumstances in which Confession was made

Violence and Intimidation

1. Degree of Violence determined to be coercive and significant:

- Yes
- No
- a) If yes, rationale given:
- b) If no, rationale given:

2. Degree of Intimidation determined to be coercive and significant:

- Yes
- No
- a) If yes, rationale given:
- b) If no, rationale given:

[SUB] Nature of Violence/Intimidation present in the Operation:

A) Are there violent acts committed directly on the suspect?

- Yes
- No

Details:

B) Are there staged acts of violence performed in front of the suspect:

- Yes
- No

Details:

C) Are there acts of intimidation enacted by the undercover officers onto the suspect?

- Yes
- No

Details:

Probative Value (Reliability): Circumstances in which Confession was made

Other Circumstances in which the Confession was made: The features of the Suspect

1. Determination on whether the Operation preyed on the vulnerabilities of the accused:

- Yes

- No

a) If yes, rationale given:

b) If no, rationale given:

-[SUB]: Are there Mental Health Problems present:

- Yes

- No

Details:

-[SUB]: Are there substance addictions present:

- Yes

- No

Details:

-[SUB]: Youthfulness:

- Yes

- No

Details:

Probative Value (Reliability): Circumstances in which Confession was made

Other Circumstances in which the Confession was made: Details of the Operation

1. What was the length of the operation?
 - Details:

2. What were the number of interactions or scenarios between the suspect and any of the undercover officers involved in the undercover operation?
 - Details:

3. How many officers were involved in the operation?
 - Details:

Probative Value (Reliability): Markers of Reliability in the Confession

Confirmatory Evidence

1. Is there confirmatory evidence present in the confession (or statements made throughout the operation):
 - Yes
 - No

- A) If yes, details of the confirmatory evidence:

- B) If yes, does the significance of the confirmatory evidence overrule other factors that diminish the reliability of the confession (i.e significant inducements or violence):
 - Yes
 - No

Rationale:

Probative Value (Reliability)

1. Given the above determinations regarding the circumstances in which the confession was made and the markers of reliability within the confession itself, was the MBS confession evidence determined to be reliable?

- Yes
 - No
- a) If yes, what is the rationale given:
- b) If no, what is the rationale given:

Police Misconduct

State Behaviour when Eliciting an Confession: Police Misconduct

1. Has the Judge determined that an abuse of process has taken place?

- Yes
 - No
- a) If yes, what is the rationale for the determination of an abuse of process taking place?
- b) If no, what is the rationale for the determination of an abuse of process not taking place?

Prejudicial Effect

Prejudicial effect: Bad Character Evidence

1. Did the judge determine that there would be a prejudicial effect for admitting the confession evidence obtained from the MBS?
 - Yes
 - No
 - a) If yes, what is the rationale:
 - b) If no, what is the rationale:
2. If it was determined the confession evidence would have a prejudicial effect if admitted, did the judge determine that the probative value of admitting the confession evidence would outweigh the prejudicial effect?
 - Yes
 - No
 - a) If yes, what is the rationale:
 - b) If no, what is the rationale:

Other

Tactics Used in the Undercover Operation

-

<u>Other</u>
Additional Legal Regulations [Data Driven]
1. <u>Are there additional safeguard developed/implemented to go alongside the two-pronged admissibility test?</u> • Yes • No a) <u>If yes, what is the nature of the additional safeguard:</u>

Other
Audio and/or Video Taped Scenarios
1. <u>Are there scenarios in the undercover investigation that are audio taped?</u> • Yes • No a) If yes, what are the details (how many scenarios, what type of scenarios): • 2. <u>Are there scenarios in the undercover investigation that are video taped?</u> • Yes • No a) <u>If yes, what are the details (how many scenarios, what type of scenarios):</u> •

Other
Additional Evidence Not Obtained from the MBS [Data Driven]
1. <u>Is there additional evidence present, which establishes the suspects guilt, that was not obtained during the undercover operation or the resulting confession from that operation?</u> • Yes • No a) <u>If yes, what are the details:</u> •

Other
Suspect Denial of Committing the Crime under Investigation
1. <u>Does the suspect deny involvement or committing the crime under investigation?</u> • Yes • No a) <u>If yes, what are the details of this denial?</u> • b) <u>If yes, how many scenarios does the suspect deny involvement or committing the crime under investigation?</u> •

Appendix B: Coding Manual

Case Citation, Level of Court, and Outcome

It is necessary to record the case citation in order to acknowledge which case the coded information and decision came from. Also, the type of crime committed in the case will be recorded, as well as the levels of court. The levels of court consist of:

1. A *voir dire* at trial to determine whether the confession evidence was admissible;
2. A trial decision that contains both the result of the *voir dire* (if available) and the verdict of the trial;
3. A Court of Appeal decision that reviews verdicts that occurred before the admissibility test was developed, and then applies the new admissibility test to the confession evidence that was presented at trial;
4. And Supreme Court of Canada decisions.

The trier of fact (judge and/or jury) during the trial will also be noted as it has significance in relation to prejudicial effect that could accompany the admission of “Mr. Big” sting confession evidence. Lastly, the result of the case will be examined. The results will consist of decisions from either a:

1. *Voir dire*, either the confession evidence is admitted or not admitted;
2. Trial (where a *voir dire* has already taken place) either the accused is convicted or is found not guilty;
3. Appeal, where either the appeal is dismissed, or granted (usually in the form of a new trial);
4. The Supreme Court of Canada, where the appeal is dismissed or granted.

Probative Value

A) Circumstances in which the Confession was Made

i) Inducements

Inducements are one aspect examined in the determination of reliability concerning confessions obtained through a “Mr. Big” sting. Inducements are considered to be of the financial and social form. Under analysis will be whether the inducement is considered to have been a significant influence on the suspect, overcoming the will of the suspect, and the rationale for that determination.

Financial Inducements: the judge examined the financial inducements received by the suspect during the undercover operation in accordance with the financial situation of the suspect prior to the undercover operation. This is done in order to determine whether the financial inducements offered are significant in the sense that they would have overcome the will of the suspect (*R v. Hart*, 2014: para. 102). The details of this determination will be noted.

Social Inducements: the judge will examine the extent of the social inducements present, which amount to the nature of the relationship between the suspect and the undercover officers in terms of social bonds, loyalty and friendship. These factors are to be examined within the context of the social make-up of the suspect prior to the undercover operation (*R v. Hart*, 2014: para. 102). This analysis will be conducted to determine if the social inducements present are significant in the sense that they contributed to overcoming the will of the suspect. The details of this determination will be noted.

Other Inducements: the judge focused also on the inducements offered during the meeting(s) with the undercover agents, which also constitutes concern regarding the conduct of the “Mr. Big” interrogation (*R v. Hart*, 2014: para. 102). The interrogation is usually conducted by Mr. Big, another high-ranking member of the organization, or a “fixer of legal problems” member of the organization. These types of inducements can be: advancement within the fictitious organization such as full time admission into the criminal organization; the avoidance of criminal prosecution [it is typically portrayed that an arrest/conviction of the suspect is imminent].

- Financial Inducements received by the suspect:
 - The financial inducements will typically be comprised of the type of work the suspect did in exchange for money, and the amount of money they are receiving in exchange for their services for the fictitious organization.
- Financial situation of the suspect:
 - The financial situation is significant because this can dictate the influence of financial inducements. For example, if the suspect is from a disadvantaged financial background and/or unemployed, significant financial inducements could have a greater influence on the suspect. The financial situation of the suspect before, and during, the undercover operation is important to examine for these reasons.
- Extent of Social Inducements present in the operation:
 - The extent of social inducements present in the undercover operation will be determined by the nature of the relationship between the undercover officers and the suspect. The nature of the relationship will be examined, assessing how strong or weak the social bonds, friendship, and loyalty are between the suspect and the undercover officers. The significance the suspect attributes to the social relationship will also be examined.
- Social Composition of the Suspect:
 - The social composition of the suspect prior to, and during the undercover operation will play an important role in determining whether the social inducements have overcome the will of the suspect. Examining the suspects’ prior social status, in terms of the friendship and comradery in his or her life, will be necessary in this determination.

ii) Violence and Intimidation

Violence: The presence of violence is one aspect that is examined in the determination of reliability and the degree of violence present in the undercover operation will be examined by the

judge. Violence occurred directly or through threats of violence on the suspect by undercover officers, or through staged acts of violence carried out in front of the suspect in an attempt to exemplify the violent nature of the organization and the consequences of defying that organization. The judge will determine whether these acts of violence are coercive in nature, and serve to coerce the suspect to provide the confession out of fear and/or intimidation and have overcome the will of the suspect. The rationale for this decision will be examined.

Intimidation: Intimidation is recognized as various tactics that instill fear in the suspect, a fear that can possibly overcome the will of the suspect, jeopardizing the reliability of the confession. Intimidation can take the form of: various threats made by the undercover officers, aggressiveness expressed by the undercover officer(s) during the interview with “Mr. Big”, or expressing to the suspect that the officers involved in the undercover operation know, beyond a doubt, that the suspect committed the crime under investigation. There are also factors that serve to show that the suspect was not intimidated, such as the repeated statements from undercover officers that the suspect can leave the organization at any time (For example, see *Mildenberger*, 2015, para. 48-50). The judge determines whether the suspect is intimidated, and whether this influenced or coerced the suspect into providing a confession.

- Nature of Violence/Intimidation present in the Operation:
 - The different methods include:
 - First, violence could be carried out in some physical form by the undercover officers directly on the suspect.
 - Second, violence can be used as a form of intimidation, in which the undercover officers will carry out staged acts of violence against someone, which the suspect witnesses. This staged act of violence is conducted to show the suspect the violent capacity of the organization.
 - Third, intimidation can take many forms: various threats made by the undercover officers, aggressiveness expressed by the undercover officer(s) during the interview with “Mr. Big”, or expressing to the suspect that the officers involved in the undercover operation know that the suspect committed the crime under investigation, among other tactics.

iii) Other Circumstances in which the confession was made: The features of the suspect

Assessing whether the undercover operation preyed on the vulnerabilities of the suspect is another aspect in determining the reliability of the confession. This determination focuses on whether the judge determines that the operation preyed on the vulnerabilities of the suspect and the rationale for this decision. The specific vulnerabilities of the suspect, as described by the Supreme Court of Canada in *R v. Hart* [2014: para.102], are: Mental Health issues, Addiction issues, and Youthfulness.

- Mental Health Problems → If present, the details of the suspect’s history of mental health issues will be documented in order to substantiate the judge’s decision on whether the suspect’s vulnerabilities were preyed upon by the undercover operation. The court assesses mental health problems as affecting the reliability of a confession since:

“In the United States, where empirical data on false confessions is more plentiful, researchers have found that those with mental illnesses or disabilities, and youth, present a much greater risk of falsely confessing. A confession arising from a Mr. Big operation that comes from a young person or someone suffering from a mental illness or disability will raise greater reliability concerns” (*R v. Hart*, 2014: para 103)

- Addictions → If present, the details of the suspect's history of addiction issues will be documented in order to substantiate the judge's decision on whether the suspect's vulnerabilities were preyed upon by the undercover operation. By doing so, the reliability of the confession can be called into question due to the suspect's addiction issues that may have been exploited.
- Youthfulness → If present, the details of the suspect's youthfulness will be documented in order to substantiate the judge's decision on whether the suspect's vulnerabilities were preyed upon by the undercover operation. The court assesses the vulnerability of youthfulness as affecting the reliability of a confession since: “A confession arising from a Mr. Big operation that comes from a young person or someone suffering from a mental illness or disability will raise greater reliability concerns” (*R v. Hart*, 2014: para 103).

iv) Other Circumstances in which the Confession was made: Details of the Operation

In addition to addressing the circumstances of inducements, presence of violence or intimidation, and the composition of the suspect, details of the operation also influence the reliability of the confession. For analysis purposes, the details that were examined included:

- The length of the operation;
- The number of interactions or scenarios that took place between the suspect and the undercover officers;
- The number of officers involved in the operation.

B) Aspects of the Confession: Markers of Reliability

i) Aspects of the Confession: Confirmatory Evidence

Certain aspects of the confession were examined by the judge in an effort to determine whether the confession was reliable. Reliability was enhanced by the presence of confirmatory evidence, which could include:

“whether it leads to the discovery of additional evidence, whether it identifies any elements of the crime that had not been made public (e.g., the murder weapon), or whether it accurately describes mundane details of the crime the accused would not likely have known had he not committed it (e.g., the presence or absence of particular objects at the crime scene)” (*R v. Hart*, 2014: para. 105).

If it is determined that confirmatory evidence is present in the confession, the nature and details of such confirmatory evidence were noted examined, as well as the significance placed on the

confirmatory evidence by the judge. Questions asked, included: Does the confirmatory evidence overrule predetermined significant inducements, threats of violence, or the vulnerabilities of the suspect being taken advantage of?

C) Determination of Probative Value

Does the judge determine that the confession evidence has probative value? The judge's examination involves a cumulative analysis of all the above-mentioned factors concerning reliability (circumstances in which the confession was made and the aspects of the confession itself) in determining if admitting the confession evidence, or agreeing with a trial judge's decision (if the case is in front of the Court of Appeal or the Supreme Court of Canada) has probative value. The rationale for this choice will be noted.

Prejudicial Effect

A) Prejudicial Effect: Bad Character Evidence

As one of the three main concerns with Mr. Big Operations is prejudice, the judge's determination of whether the admission of the evidence obtained from the operation would have a prejudicial effect on the trier of fact will be examined. The prejudicial effect is concerned with "prejudicial facts regarding the accused's character. Putting these confessions into evidence requires showing the jury that the accused wanted to join a criminal organization and that he participated in 'simulated' crimes that he believed were real" (*R v. Hart*, 2014: para. 73).

The bad character evidence can create two kinds of prejudice. First, moral prejudice: "by marring the character of the accused in the eyes of the jury, thereby creating a risk that the jury will reason from the accused's general disposition to the conclusion that he is guilty of the crime charged, or that he is deserving of punishment in any event" (*R v. Hart*, 2014: para. 74). Second, reasoning prejudice: "by distracting the jury's focus away from the offence charged, toward the accused's extraneous acts of misconduct" (*R v. Hart*, 2014: para. 74).

The rationale for the judge's determination of whether admitting the evidence would or would not have a prejudicial effect will be examined.

If the judge determines that admitting the confession evidence will cause a prejudicial effect, the judge's ruling on whether the probative value of the confession outweighs that prejudicial effect will be explored. The rationale for this decision will also be noted.

The State's Behaviour when Eliciting a Confession: Police Misconduct

A) Police Misconduct

The second prong of the admissibility test is focused on aspects of police misconduct. In order to determine whether police misconduct occurred the judge relies on the doctrine of abuse of

process, which is:

“...intended to guard against state conduct that society finds unacceptable, and which threatens the integrity of the justice system...Moreover, the doctrine provides trial judges with a wide discretion to issue a remedy -- including the exclusion of evidence or a stay of proceedings -- where doing so is necessary to preserve the integrity of the justice system or the fairness of the trial” (*R v. Hart*, 2014: para. 113).

The doctrine of abuse of process is used in order to determine whether the actions of the police cross the line of skillful police work to become abusive and coercive tactics (*R v. Hart*, 2014: para.114-15).

In determining whether an abuse of process has taken place, the judge will review a number of different factors, which include:

“... police conduct, including inducements and threats, becomes problematic in this context when it approximates coercion. In conducting these operations, the police cannot be permitted to overcome the will of the accused and coerce a confession. This would almost certainly amount to an abuse of process ... Physical violence or threats of violence provide examples of coercive police tactics. A confession derived from physical violence or threats of violence against an accused will not be admissible -- no matter how reliable - - because this, quite simply, is something the community will not tolerate ... Violence and threats of violence are two forms of unacceptable coercion. But Mr. Big operations can become coercive in other ways as well. Operations that prey on an accused's vulnerabilities -- like mental health problems, substance addictions, or youthfulness -- are also highly problematic (*Mack*, at p. 963). Taking advantage of these vulnerabilities threatens trial fairness and the integrity of the justice system” (*R v. Hart*, 2014, para. 115-117).

Since there is no precise formula for determining when a “Mr. Big” sting becomes abusive, trial judges must determine when an abuse of process has taken place. The focus here is whether the judge determines that an abuse of process has taken place, and what the rationale is for whatever decision is made.

Other

A) Additional Legal Guidelines (Data Driven)

Are there any additional guidelines that have been developed and implemented that are directed at evidence obtained by a “Mr. Big” sting since *Hart*? This could include an addition to the two-pronged admissibility test or a new and separate legal guideline that is directed, in some way, at evidence obtained from this undercover operation. Details of any new legal safeguards will be examined.

B) Additional Evidence Not Obtained from the Sting

This can include any evidence that is used concurrently with the confession evidence gained from the “Mr. Big” sting in attempt to prove the accused’s guilt. The details of the additional evidence will be recorded.

Example: In *Mildenberger* after the suspect provided a confession to undercover officers, the police took him to the police station to be interrogated. Mr. Mildenberger then confessed a second time during the in-custody police interrogation. However, if there is little-to-no additional evidence, this is important as well, since the absence of additional evidence typically results in the confession evidence obtained by a “Mr. Big” sting as the sole piece of evidence against the accused. Additionally, it is worth exploring if it was determined that the confession evidence is crucial to the conviction. If so, a greater emphasis is placed on the confession evidence and the reliability issues surrounding it.

C) The Tactics used in the Undercover Operation

A number of different tactics were used in the undercover operation to snare suspects. These tactics can range from how contact is initiated with the suspect, how the undercover operation gets the suspect to believe his or her arrest and conviction is imminent, or the tactics used to gain the confession in the meeting with Mr. Big.

Examples (Concept driven from Keenan and Brockman, 2010):

- i) Tactics used to initiate contact:
 - a. *Police Contact:* undercover officers meet the suspect while in a holding cell and a relationship is developed.
 - b. *Grand Prize Winner:* undercover officers pose as door-to-door employees for a marketing company. The suspect is offered the chance to win a prize in exchange for filling out the survey. The suspect is selected as the winner, and meets other winners who are undercover officers from the fictitious organization, at the event.
 - c. *Use of Third Party:* undercover officers befriend an acquaintance of the suspect in an attempt to meet the suspect.
 - d. *Staged Breakdown:* undercover officers stage a breakdown of their vehicle near the suspects residence in an attempt to seek help from the suspect, initiating the relationship.
 - e. *Place of School/Employment:* undercover officers will seek out the suspects place of employment or school and initiate the relationship.
 - f. *Other tactics:* can include meeting the suspect at a drinking establishment or rehabilitation facility.
- ii) Tactics used to convince the suspect that they will be arrested and convicted:
 - a. *Corrupt Police Contacts on the Organizations Payroll:* the suspect will be told that an undercover officer will pose as a corrupt police officer on the organization’s payroll and will influence internal investigations on their behalf.
 - b. *Fake Internal Police Memorandum:* the organization reveals to the suspect a fabricated police document referring to DNA evidence, hair samples or other information signifying the seriousness of the police investigation of the suspect and imminent arrest.

- c. *Other Tactics, Confrontation (Data Driven)*: for example, in *Mildenberger* an officer who had interviewed the suspect in the investigation prior to the operation, had pretended to be drunk and confronted the suspect and stated that the police possessed evidence against him and that his arrest was looming.
- iii) Tactics used to gain a confession in the meeting with Mr. Big:
 - a. *The Fall Guy*: the organization will inform the suspect that they know his arrest is imminent, but in order to help him or her avoid arrest, a fall guy is presented who is indebted to the organization, who is terminally ill and willing to confess to the crime under investigation in exchange for financial support for his family from the organization. The suspect is told that all Mr. Big needs is details of the crime so the confession is believable.
 - b. *Destruction of Evidence*: Mr. Big will offer a plan for police contacts to destroy all evidence that incriminates the suspect in the current investigation. In exchange the suspect must provide details concerning the crime.
 - c. *Beating a Polygraph Test*: Mr. Big produces fake police documents about the investigation of the suspect, to which he will hire an expert and guarantee that the suspect will pass a polygraph test to stave off the investigation.
 - d. *Frame Someone Else*: Mr. Big will offer to frame someone else for the crime. Similar to the Fall Guy, Mr. Big needs all the details about the commission of the crime in order to make the set up believable.

D) What Scenarios, if any, were Audio and/ or Video Taped during the undercover Operation

Given that the recommendation for increased audio and video recording of undercover scenarios has been recommended in a number of research studies, it was decided to record instances where scenarios are audio and/or videotaped. For example, examination of whether the scenarios were audio or video taped, how many scenarios were audio and/or video taped, and what scenarios were audio and/or video taped will be noted.

E) Suspect Denial of Committing the Crime under Investigation

Determinations will be made as to whether the suspect denies committing, or having any involvement in committing, the crime under investigation. If there is a denial, the details of the denial(s) will be recorded. In accordance with the denial details, the number of scenarios in which a denial occurred will also be noted. The presence of denials, especially numerous denials, may be indicative that the undercover officers persistently pressured the suspect to confess.