# “MR. BIG” RECRUITING FOR THE CRIMINAL UNDERWORLD: AN EXAMINATION OF UNDERCOVER POLICE INVESTIGATIONS IN CANADA

by

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Bachelor of Arts, St. Thomas University, 2004

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# ABSTRACT

This thesis examines a controversial, yet increasingly common, undercover operational method known as the Mr. Big strategy where undercover police officers masquerade as criminals in order to elicit confessions from their targeted suspects. The analyses are based on a sample of 63 reasons for decision in Canadian criminal cases from 1992 to 2008 where a confession was tendered as evidence at trial as a result of a Mr. Big investigation. An analysis of emerging trends in judicial decisions over the past 16 years helped trace the emergence, advancement, and sustainability of this post-offence undercover interrogation technique, highlighting potential risk factors that could be instrumental in the elicitation of unreliable, misleading, or inaccurate information from unwitting suspects. This thesis concludes by putting forward for consideration recommendations for legal reform that could help prevent the elicitation of false confessions and further miscarriages of justice in the Canadian criminal justice system.

**Keywords: wrongful conviction; reliability of evidence; false confessions, undercover investigations**

**Subject Terms: police questioning—psychological aspects; confession law—Canada; miscarriages of justice, undercover policing**

# DEDICATION

For my dear mother Sabina, my sister Megan, and in loving memory of my father, James Alvin Keenan (1949-2006)

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> *One need not be referred to evidence to acknowledge the ubiquitous nature of criminal activity in our society. If the struggle against crime is to be won, the ingenuity of criminals must be matched by that of the police; as crimes become more sophisticated so too must be the methods employed to detect their commission (Mr. Justice Antonio Lamer in Mack, 1988, para. 15).*

## Michael Bridges

Following the mysterious disappearance of Erin Chorney, on 21 April 2002, police in Brandon, Manitoba, initiated a nationwide search. Crown prosecutor Bob Morrison said the disappearance "remained a compelling mystery for a long time" (MacAfee, 2005a, A.10). Initially treated as a missing person case, police would soon have reason to suspect foul play. Weeks earlier, her ex-boyfriend, Michael Bradley Bridges, had been charged with assaulting Chorney, and he admitted to being the last person to see the victim (*McIntyre*, 2006, A.9). As a result of the investigation that followed, Brandon Municipal Police suspected Bridges of being involved criminally in the disappearance of his ex-girlfriend, but lacked sufficient evidence to make a strong case against him. Investigators turned to the RCMP for help. They launched a four-month undercover operation involving 15 undercover officers posing as members of a powerful and wealthy national criminal syndicate. The aim of this last resort effort was to obtain vital evidence relating to the Chorney investigation (MacAfee, 2005b, A.12).

To initiate contact with the target, an undercover RCMP officer, posing as a marketing company representative, knocked on Bridges' door and asked him to participate in a survey, which he did. Shortly thereafter, the suspect was notified that, as a result of his participation in the survey, he and the other "grand-prize winners", all

undercover police officers, won an all expenses paid trip to see an NHL hockey game in Calgary. At the game, Bridges was acquainted with one of the other winners, who relayed to him that he belonged to a successful criminal organization. The undercover officer befriended the target and successfully recruited him to participate in various activities (*Bridges*, 2005a, para. 3). Over time, Bridges would participate in a number of scenarios involving purported criminal activities for which he was paid lucrative sums of cash.

From the onset, repeated themes of honesty, loyalty and truthfulness were developed with the target. Bridges was led to believe that he was being recruited to join the organization but that in order to be taken in as a member he would be required to disclose details of his criminal past. Bridges was told that the boss of the organization, Mr. Big, could make his criminal problems disappear but that he had to be honest and truthful with the boss (para. 6). Only upon verification of the details, which would be cross-referenced with Mr. Big's extensive connections, would Bridges be made a member of the organization.

In a meeting representing what Bridges thought was a dress rehearsal for a pending interview with the all-important crime boss, Bridges brought up the death of his ex-girlfriend. The undercover operative posing as the main contact for the criminal organization indicated to Bridges that the organization could retrieve the body from the burial site, dispose of the evidence, and create an alibi for Bridges' whereabouts at the time of the murder (*Bridges*, 2005a, para. 19; MacAfee, 2005b, A.12).

Bridges carefully outlined his involvement in the murder of Erin Chorney, describing in detail how he planned to bury her in a Brandon, Manitoba graveyard, in an already excavated grave. He indicated that he wrapped the body in a white, flat, not fitted, bed sheet, and buried Chorney face-up in the centre of the grave. He also told the

undercover investigators the type of shovel he used to bury his ex-girlfriend (MacAfee, 2005b, A.12). According to Menzies J., “much evidence was heard as to the emphasis placed on the necessity of telling the truth if one wanted to be a member of this organization” (*Bridges*, 2005a, para. 15). Consequently, “the motive which caused him to confess would also operate as the motive which caused him to tell the truth” (para. 19). A noteworthy fact is that the police located the deceased’s body *only after* receiving the information from Bridges. Had it not been for the elaborate undercover investigation employed by the RCMP, the murder of Erin Chorney might still be unsolved. In the end, a jury of his peers convicted Michael Bradley Bridges of first-degree murder (*Bridges*, 2006).

## Andrew Rose

On 6 October 1983, the bodies of two German travelers were discovered in a wooded area approximately 32 kilometers west of Chetwynd, British Columbia. Both victims had been shot in the head (*Rose*, 1991, para. 3). The victims’ camping gear, passports, and traveler’s cheques were missing from the crime scene, suggesting robbery as a motive. The following day, a pair of bloodstained blue jeans, waist size 34 inches, was discovered a few kilometers from the crime scene. A forensic serologist determined that the blood was consistent with that of the victims (*Rose*, 1991, para. 6). Alas, the case went cold, and nearly six years passed before the RCMP would catch the break they anxiously needed.

In August 1989, Madonna Mary Kelly, an acquaintance of Andrew Rose, who was then living in Newfoundland, told a drug dealer who was staying with her that on the night of the murders Rose came to her home covered in blood, claiming to have just killed two people. The drug dealer turned out to be an undercover police informant who subsequently relayed the information to the RCMP. As a result, Andrew Rose was

arrested and charged with the double murder of the two German tourists (*Rose*, 1991, para. 8).

Although Rose acknowledged that he wore size 34 jeans in 1983, the prosecution was unable to prove that the bloodstained jeans belonged to him. As Gudjonsson (2003b) indicates, the circumstantial evidence was in Rose's favour; he did not have access to firearms, he did not cash the travelers' cheques belonging to the victims (the victims' travelers cheques were cashed by someone other than the accused), and he did not own a vehicle (574). Since there was no other evidence linking Rose to the crime, the incriminating statements he made to Madonna Kelly would become the lynchpin in the Crown's case (*Rose*, 1991, para. 10). Notwithstanding the lack of physical evidence, Rose was convicted of the murders on the testimony of Madonna Mary Kelly. However, in 1992, the British Columbia Court of Appeal overturned the guilty verdict, finding that there was significant circumstantial evidence that could have raised a reasonable doubt about his guilt (*Rose*, 1992, para. 45).

At his second trial Rose was again convicted of the double homicide. Once more, the only evidence connecting him to the murders was the testimony of Madonna Mary Kelly (para. 4). Subsequent to his second trial, Rose provided the RCMP with a blood sample for DNA analysis, which excluded Rose as a source of the DNA found at the crime scene (Gudjonsson, 2003b, 575). In addition, the RCMP followed up on a confession made by one Vance Hill to his estranged wife about the murders. Hill's story was consistent with the facts of the case. Unfortunately, Hill committed suicide on 28 July 1985, and as a result, there was no way to confirm the veracity of his statements (*Rose*, 1998, para. 6). In light of the fresh evidence, Rose was granted yet another trial (Gudjonsson, 2003b, 575).

Perhaps the result of tunnel vision, Gudjonsson (2003b) notes how Canadian police were concerned that the newly acquired exculpatory evidence could result in Rose's acquittal. Such tunnel vision led the RCMP to trick Rose into confessing by engaging him in an undercover operation (575). As part of his bail conditions, Rose was required to sign in at the RCMP headquarters in Thompson, Manitoba, where he had taken up residence. Outside the station, he was introduced to Fred, an undercover police officer posing as the main contact for a wealthy criminal organization (Burke, 2009). Fred was charged with the task of befriending Rose, which he did by hiring him to do a job for the criminal syndicate. Over the next few months, Fred involved Rose in a series of various criminal activities, mainly to do with drug trafficking, for which Rose was paid (575). Fred indicated to Rose that he could stand to profit a great deal from the organization but that he would have to meet with Al, "Mr. Big", to discuss some troubling issues in his past that could jeopardize his career in the organization. Al claimed to be able to help him with his problems and the murder charges, stating, "If I fucking help you, you would be guaranteed not to be found guilty…You won't even go to another trial" (578).

During the undercover interrogation sessions Rose was subjected to "relentless pressure, abusive language, threats, inducements, robust challenges and psychological manipulation" (Gudjonsson, 2003b, 578). Rose emphatically stated that he could not and would not confess to a crime he did not commit. The following exchange took place between Mr. Big and Rose:

> Al: Yeah, that's a lie, that's a fuckin' lie right off the bat. Cuz everything I fuckin' found out about it, the evidence is all fuckin' there that you did it. They convicted you twice on the fuckin' thing; they can convict you a third time. Listen, I don't give a fuck.

Rose: I do not lie to you.

Al: I don't give a fuck, let's get that clear. But, if you're just gonna lie to me, and you don't want fuckin' help, then I can't help you. I'm helping you because…

Rose: If I tell you I didn't do it and you don't believe I didn't do it. What am I supposed to say? I need your help.

Al: Yeah, well, you're not gonna fuckin' get it unless I get the fuckin' story. And I'll explain to you how…

Rose: I didn't do it.

Al: I'll explain to you how I can fuckin' help you.

Rose: What can I say now?

Al: Tell me the truth.

Rose: I didn't do it.

Al: Come clean with me and I'll tell you how I'm gonna help you.

Rose: I didn't do it.

Al: Well then you don't need my help.

Rose: I'll never say I did it. I'll never say I did it, cuz I didn't.

Al: Well…

Rose: So, what can I say?

Al: Well, if you didn't do it, you don't need my help. Let's let the fuckin' courts decide. If I fuckin' help you out you'd be guaranteed not to be found guilty, but I'm not fuckin' helping you out for the fuckin' uh, I don't fuckin'…

Rose: Yeah, but you want me to say I'm guilty.

Al: I want the fuckin' uh, I want to be able to fuckin' trust you. When leave this fuckin' room I know I've got a guy I fuckin' trust.

Rose: I know…

Al: All the fuckin' circumstances I have found out and I've looked into I have fuckin' come away fuckin' saying, "Okay, this guy offs these two people, I don't give a fuck why. That's the least of my fuckin ' worries. I will help him if he fuckin' just comes clean, and if he doesn't, then I'm not givin' him a fuckin' minute of my fuckin' time anymore".

Rose: I didn't do it, okay?

Al: Well then, there you go. You don't need my fuckin' help, do you?

Rose: Damn right I do.

Al: You better come clean.

Rose: Well, I'm still not gonna say I did it, cuz I didn't. So, what am I supposed to say?

Al: From what I know, you haven't got a chance. That lady from the states, she'll not be givin' the evidence you think she's gonna be givin'.

Rose: No?

Al: The police have been fuckin' soft-shoein' her big time. That's why this has been fuckin' delayed the way it is.

Despite considerable psychological manipulation and pressure to break down Rose's resistance, persuade him of his guilt, and elicit a confession by reiterating the strength of the evidence against him and the likelihood of a third conviction, Rose repeatedly and emphatically denied any involvement in the double murders.

Rose: I'll tell you right now, if this means the end of me and you and Fred, whatever…I will not say I did it. That's it. Then I'm outta here, you know, simple as that. That's the way she goes. I will not say I did it when I didn't do it, and I didn't do it and that's it.

Al: Go downstairs to the lounge, have one fuckin' beer, think this over.

Rose: Well, I'm not gonna come back up here and say I killed them.

Following their discussions, Rose and Fred went downstairs to the lounge where they spent almost two hours drinking beer (Gudjonsson, 2003b, 579). However, it is unclear how much alcohol was consumed.

After repeated and emphatic denials to Mr. Big, a man who arguably undermined Rose's confidence in both the criminal justice system and his legal team (Burke, 2009),[1] Andy Rose would eventually confess, telling Al and Fred what they wanted to hear, "Well, we'll go with I did it, okay"? In the end, RCMP operatives elicited a confession from him in the second and third interrogation sessions, which were audio and videotaped. Not surprisingly, Rose was unable to provide undercover operators with specific details about the circumstances surrounding the double murders outside the scope of those already known to the police or media. For instance, when asked where he got the firearm he responded, "Oh I had it, I had it" (Gudjonsson, 2003b, 579). Rose's numerous attempts to retract his confession would prove futile.

At Rose's third trial, defence counsel sought to qualify Dr. Gisli H. Gudjonsson, a forensic psychologist with special expertise in the area of police interrogation and false confession and professor of forensic psychology at King's College London, as an expert. It was hoped that Gudjonsson would give evidence with regard to the scientific literature related to false confessions, the nature of police interrogation techniques, similarities between non-custodial and custodial interrogation techniques, factors in this case consistent with those typically found in cases of false confessions, the results of the psychological evaluation, and the reliability of Rose's admission to RCMP operatives (Gudjonsson, 2003b, 580).

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[1] In *Burlingham* (1995), the Supreme Court of Canada noted that s. 10(b) of the *Canadian Charter of Rights and Freedoms* "specifically prohibits the police…from belittling an accused's lawyer with the express goal or effect of undermining the accused's confidence in and relationship with defence counsel (para. 14). However, since the Andrew Rose was not being detained or under arrest at the material time, undercover operatives were able to circumvent this restriction.

In addition to conducting a psychological evaluation of Rose, Dr. Gudjonsson read through transcripts of the telephone conversations and interviews with undercover officers, he listened to audiotape evidence, and watched the videotapes of the interviews with undercover officers. Significantly, Gudjonsson (2003b) found evidence of "relentless pressure, abusive language, threats, inducements, robust challenges and psychological manipulation" (578). As a consequence he concluded that the "immense pressure that Rose was placed under, and the extreme distress he displayed during the three videotaped interviews, raises important ethical issues about the use of non-custodial interrogations" in cases such as this (Gudjonsson, 2003b, 581).

In January 2001, however, the prosecution's case would incur a setback, as further DNA analysis eliminated Rose as a suspect. Though the lack of physical evidence linking Rose to the murders significantly undermined the Crown's case, they still had Madonna Mary Kelly's testimony, which was the lynchpin that convicted him twice before. Yet, after careful deliberation with the office of the BC Attorney General, the prosecution announced that they would no longer be proceeding with the case against Rose. In the opinion of Crown counsel, Gil McKinnon, Q.C., "to have a conviction against a person, I want to be very certain that that is the person who committed the offence" (Burke, 2009). He went on to say that he would have been uncomfortable if a guilty verdict had been reached.

## Undercover: Circumventing the Evidentiary and Procedural Limitations at Common Law

The use of police undercover tactics in law enforcement is met with both praise and criticism and has resulted in a long and contentious debate. Indeed, the police have a responsibility to competently investigate crimes reported to them, and to ensure the maintenance of public safety. However, as a result of what Bronitt (2004) describes as a

progressively more regulated and restrictive custodial investigative environment, law enforcement agencies have felt compelled to adopt novel and sophisticated undercover policing strategies in order to systematically and effectively investigate crime and disorder (36).[2] In contrast with traditional investigative techniques, covert policing strategies are subject to fewer legal restrictions, thus enabling police to circumvent many of the procedural and evidentiary rules that govern actions taken by police acting in their usual public capacity (Bronitt, 2004, 36; *Evans*, 1996, para. 36; Leo, 1992, 43).

In a development that can be traced to the contemporary confessions rule and the related common law limits on police interrogation in Canada, the RCMP has creatively fashioned a successful, yet controversial, undercover policing technique commonly referred to as the "Mr. Big" scenario.[3] Investigators claim to turn to this investigative technique in a last resort effort to obtain incriminating evidence in the form of a confession from a suspect in serious criminal investigations that have reached an impasse (*Osmar*, 2007, para. 1). Having eliminated all other suspects, but unable to obtain sufficient evidence to support a charge against a suspect, this investigative procedure can either produce sufficient evidence to substantiate a charge against a suspect, identify additional suspects in the criminal investigations, or eliminate a suspect from suspicion (*Dix*, 2001, para. 14; *Skinner*, 1993, para. 7).[4] Al Haslett, an RCMP sergeant based in Kelowna, British Columbia, has been credited as one of the pioneering architects who helped develop this cutting-edge interrogation technique: "I

[2] Law enforcement agencies are, now more than ever, overburdened by increasingly sophisticated organized criminal activity, transnational crime, and threats to national security (Bronitt, 2004; Haggerty & Gazso, 2005; Ross, 2002).

[3] This tactic has also been referred to as the crime boss scenario and the advanced homicide undercover technique (Gorbet, 2004, 54)

[4] According to a lawyer representing the RCMP, the target is charged in three-quarters of the Mr. Big operations that are conducted and cleared of responsibility in only a handful of cases (Baron, 2008a, A.4).

was probably the one who started it…I was just thinking outside the box, trying to see how far we could go" (Hutchinson, 2004, RB.1). Just how far will they go?

The Mr. Big tactic is usually a two-phase process of surveillance and interrogation, where operatives continuously interchange roles as passive observers and active participants. After following a target for some time in order to gather information about that person's daily habits (Baron, 2008b, A.8; Cherry, 2005, A.8; *Evans*, 1996, para. 5; *Hart*, 2007, para. 18; *Lepage*, 2003, para. 14; *Macki*, 2001, para. 9), the police develop an interactive scenario.[5] The thrust of a Mr. Big scenario is to have a number of undercover police officers adopt fictitious criminal personas, pose as organized crime figures, and deceive the suspect into believing he or she is being conditioned to join an intricate and highly successful criminal syndicate under the direction of Mr. Big, the boss of the enterprise (*Bicknell*, 2003, para. 94; *Dix*, 2002, para. 119). An offer of a lucrative career in organized crime is held out to the suspect on the condition that the crime boss is "satisfied of [his or her] honesty and trustworthiness" (*Skiffington*, 2004, para. 10). Indeed, the RCMP has perfected a backdrop that simulates a real-world criminal environment where undercover agents are enmeshed both directly and surreptitiously with the criminal underworld, so much so that it is difficult to differentiate fantasy from reality. The verisimilitude of their performance is gripping. Hank Reiner, a British Columbia prosecutor, commented on the undercover sting operation saying, "If you are

[5] An undercover officer who has participated in over 100 Mr. Big stings said, "We definitely get as much detail as we can about the target, so we know, for the most part, how we should be acting around him or her. Everything is thought out methodically" (Baron, 2008b, A.8). Marx (1988) indicates that a suspect's behaviour will be conditioned by what the environment offers (72). In some instances, the police will consult with behavioural profilers, psychologists and forensic psychiatrists about the personality and behaviour of the target. These experts can help undercover operatives assume the persona of criminals who can interact with the accused (*Griffin*, 2001, para. 39; *Osmar*, 2001, para. 35). This stage of the operation can take weeks or even months to complete (Baron, 2008b, A.8). What's more, the target can remain under surveillance during the undercover operation (*Roberts*, 1997, para. 3).

going to pretend that you are a member of a gang, you have to adopt the colouration of the gang" (Baron, 2008d, A.10).[6]

RCMP operatives endeavour to make contact with the target, and establish their credibility as members of a criminal organization (*MacMillan*, 2000, para. 23). Intrinsic to the success of the operation (i.e., obtaining a confession from the target) is the "carefully structured relationship" that develops between the target and the undercover operators (*Evans*, 1996, para. 28).[7] From the outset of the operation, undercover officers articulate the demands of the organization: that honesty, trust, dependability and loyalty are hallmark requirements for membership (*MacMillan*, 2000, para. 58).[8] Through various scenarios or meetings, officers are able to develop a trust between themselves and the target, gaining his or her confidence over time. Equally important, undercover operatives clearly articulate to targets throughout, that they are free to come and go, and can withdraw from the organization at any time (*McIntyre*, 1993, para. 55).[9]

The scenarios consist of a series of lucrative, yet staged, criminal activities and tasks the target performs for the gang (*Bicknell*, 2003, para. 93). These criminal tasks give credence to the legitimacy of the criminal enterprise. As the scenarios progress, the target is engaged in "a simulated and progressively escalating series of criminal activities" (*Cretney*, 1999, para. 12) and, correspondingly, is offered increasing

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[6] By closing the gaps between appearance and reality, a well-executed simulated event is the reflection of its reality, where the viewer cannot distinguish the real from the simulated (Bogard, 1996).

[7] For example, according to Preston J., RCMP operatives and their target Wesley Evans "typically spent their time together drinking and watching strippers, discussing sexual exploits in the grossest possible language, and telling Mr. Evans of their criminal behaviour. They told him that they were his friends and that if he was ever in trouble he could call them" (*Evans*, 1996, para. 7).

[8] This code will be revisited in chapter four. It becomes a vital tool for judges and juries when determining the reliability of the accused person's statements.

[9] This thesis will later show how this acts to safeguard undercover police officers from having control over an individual's movements so as not to deprive the suspect of their constitutional right to silence as protected by section 7 of the *Canadian Charter of Rights and Freedoms*.

responsibility and monetary rewards (*Bicknell*, 2003, para. 96, Nowlin, 2004, 384). The staged criminal activities of the criminal syndicate are wide-ranging, including but not limited to, picking up and dropping off parcels, acting as a lookout during various criminal transactions, delivering vehicles, counting large sums of money, drug trafficking, sales and distribution of firearms, feigned contract killings (murder for hire), forcibly collecting unpaid debts, break and entry, and sales and distribution of contraband (*Caster*, 1998, para. 19; Gorbet, 2004, 55; *Grandinetti*, 2005, para. 8; *Hart*, 2007, para. 17; *Joseph*, 2000, para. 40; *Proulx*, 2005, para. 11). If necessary, undercover police officers will resort to more aggressive scenarios including feigned murders, staged kidnappings and beatings to project a convincingly corrupt image (Baron, 2008a, A.4; Hutchinson, 2004; RB.1).[10]

The undercover operation is aimed at making the target believe he or she is an up-and-comer in the criminal organization, but that the target must first confirm their loyalty by disclosing details of a criminal past (*Bicknell*, 2003, para. 94; *Unger*, 1993a, para. 21; Stueck, 2008, A.3.). Here, the undercover investigation culminates in a meeting, akin to a job interview, where the target is introduced to and interviewed by Mr. Big, the commanding boss of the fictional criminal syndicate (*Bicknell*, 2003, para. 103; *Peterffy*, 2000, para. 6). He "is a shape-shifter, a chameleon. He moves with ease between our everyday world and the world of violence and darkness beneath" (Baron, 2008b, A.8). Although a fiction, Mr. Big is a professional interrogator charged with the task of eliciting inculpatory statements from the target about his or her criminal past. He is portrayed as an all-powerful individual who has extensive connections ranging from the criminal underworld to reliable police sources, and various other criminal justice

[10] For examples of these types of scenarios see the cases of *Dix* (2002), *Terrico* (2005), and *Roberts* (1997).

officials. He “projects confidence. His naturally serious manner edges toward menacing. This is a man who brooks no nonsense” (Baron, 2008b, A.8).

With an uncompromisingly forthright attitude, the crime boss expresses concern he has about the target’s criminal past, which could jeopardize the integrity or the existence of the organization. The crime boss is especially interested in any serious criminal investigations that might generate police attention, such as the target’s involvement in the alleged crime (Staples, 2009, A.1). Generally, the target is shown a purportedly official police document indicating that he or she is the focus of a serious criminal investigation, and that an arrest is imminent. Mr. Big outlines a scheme that he assures will help the target avoid criminal prosecution, contingent on the target being entirely forthcoming about his or her involvement in the ongoing investigation. Targets are of no value to the organization with outstanding charges (known as “heat”). Once more, the boss reiterates the importance of trust, honesty, and loyalty, attributes the organization demands from its members (*MacMillan*, 2000, para. 52). Moreover, the boss advises the target that he will use his “sources”, which permeate all levels of the criminal justice system, to check the veracity of all statements given to him (*Simmonds*, 2000, para. 32). For example, in *Giroux* (2007) the undercover officer stated: “Tell me what happened ‘cause I know what happened. I’m testing you right now to see if you’re a liar or if you’re … solid. [pause] There’s nowhere’s…nowhere’s where I haven’t been before okay?” (para. 92). Upon verification of the target’s story, Mr. Big promises not only to help make the “problem” go away, but the target is promised great financial gain and membership into the criminal organization (*Skiffington*, 2004, para. 34). These interviews are usually audio and video recorded and tendered as evidence at trial.

Details concerning intelligence matters in Canada have historically been a matter left unspoken at almost all levels of civic discourse (Security Intelligence Review

Committee, 2005), and are customarily shrouded in secrecy (Marx, 1988, 15). Indeed, the enigmatic and classified nature of undercover work is the cornerstone of its very success (Ross, 2008a, 469). However, critics have argued that restricting the public's access to information about how the RCMP conducts criminal investigations prevents public scrutiny and oversight, and perpetuates an uncritical attitude. Mulgrew (2007) suggests that the veil of secrecy surrounding RCMP operational methods is rhetoric "designed to prevent public discussion and oversight" about the activities of government officials (B.1). Reflecting a similar sentiment, Rob Anderson, a lawyer for the Vancouver Sun, says that to enshroud in secrecy information related to these operational methods would "criminalize public discussion about the policies and practices of the police and the functioning of the criminal courts" (Tibbetts, 2001, A.3). Political studies Professor Emeritus C.E.S. Franks, of Queen's University, warns about the dangers that stem from a culture of secrecy: "Secrecy in any government agency is an invitation to an abuse of power, and there is therefore a potential threat to free discussions and democratic politics" (Security Intelligence Review Committee, 2005, 8).

Applications for sweeping publication bans by the RCMP were once routinely made to protect information related to the identity of undercover operatives involved in these covert operations, as well as details of the undercover techniques employed by the police (*O.N.E.*, 2000b, para. 3). As Hutchinson (2007) indicates, these bans placed "very narrow limits on what the media could report" (A.1). In *Mentuck* (2000a), for example, lawyers on behalf of the RCMP applied for a ban on the publication of information related to the identity of the RCMP operatives and the specific operational methods employed by officers in the investigation of Clayton George Mentuck. Law enforcement officials expressed concern that "the techniques used in this case have taken years to develop and refine for use in undercover operations", and that lifting the

cloak of secrecy on the Mr. Big technique might very well expose potential targets to sensitive information thus rendering the technique “ineffective or less effective in the pursuit of criminals” (*Mentuck*, 2000a, para. 8).

Upon reviewing the stated law (i.e., *Dagenais v. Canadian Broadcasting Corp.*, 1994), Menzies J. dismissed the application to ban the publication of the specific undercover techniques because it effectively curtailed “the rights of the press to report on the trial proceedings and the right of the accused to a fair trial” (*Mentuck*, 2000a para. 9), although he did prohibit the publication of the names and identities of the undercover police officers involved in the investigation and any information that could publicly identify the RCMP operatives for a period of one year (para. 13). He went on to say that preventing the dissemination of information related to police investigative techniques would fundamentally shelter the RCMP from 'the penetrating light of public scrutiny' (para. 10).

On further appeal to the Supreme Court of Canada, Justice Iacobucci, for the Court, highlighted the importance of balancing “the interests of the public in ensuring effective policing and society's fundamental interest in allowing the public to monitor the police, as well as the right of the accused to a ‘fair and public hearing’” (*Mentuck*, 2001, para. 1). In a unanimous decision, the Court affirmed the order of the Manitoba Court of Queen's Bench to lift the publication ban on the RCMP operational methods because “the deleterious effects [of a ban] on the rights protected by ss. 2(b) and 11(d) of the Canadian Charter of Rights and Freedoms” would outweigh any efficacy the ban might have on police investigations (*Mentuck*, 2001, para. 2). The Court ruled that insulating police conduct from public scrutiny “seriously deprives the Canadian public of its ability to know of and be able to respond to police practices that, left unchecked, could erode the fabric of Canadian society and democracy” (para. 51).

In an antithetical, or perhaps cooperative move, the RCMP now grants public access to this exclusive criminal underworld. RCMP Supt. Lorne Schwartz, head of B.C. undercover operations, says the reason for this is that:

> Any time you run a covert operation, the public wants to know what's going on. That's public money going into this, and not a lot of information coming out. The truth of the matter is we don't want to talk about it, but we felt the need to be somewhat accountable, a little more transparent. We want to assure the public that when we do these [Mr. Big stings], we're trying to solve crime (Dawson, 2008, A.4).

Canada's national police force has released figures related to the use, expenditure of funds and success rate of the Mr. Big investigational technique. It was recently reported that the RCMP has employed this undercover sting operation on 350 occasions, and has a 75% conviction/clearance rate (Dawson, 2008, A.4). At an average price tag of $137,000,[11] the RCMP has assured the public that undercover investigations of this magnitude are a last resort technique reserved for the most serious criminal offences, and are not initiated unless the police have reliable evidence supporting guilt.[12] The conviction rate of those cases that go to trial is a remarkable ninety-five percent (Baron, 2008a, A.4). At present, there is no annual report or organized public database that tracks the frequency or outcome of Mr. Big undercover operations.

Though successful in achieving its desired result, the Mr. Big strategy has provoked a storm of protest from scholars and members of the legal community alike. Many argue that these role-playing scenarios undermine the fundamental principles of

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[11] See Baron, 2008a, A.4.

[12] Powell and Rusnell (1999) reported that a 1994 undercover investigation undertaken by the Sherwood Park police detachment targeting Jason Dix came with price tag of $137,000. Lasting thirteen months, the operating costs covered miscellaneous expenses, and did not include salaries or overtime of the 52 police officers involved in the undercover operation (F.1.). Also, Brautigam (2007a) reported that the elaborate four-month sting operation launched to recruit Nelson Hart into a fictitious criminal syndicate ended up costing $413,000 (16). Following the March 2005 murder of four RCMP officers in Mayerthorpe, Alberta, the RCMP initiated a three-year, $2-million undercover operation to find the person(s) who allegedly aided James Roszko, the man responsible for the shootings (Libin, 2009, A.15)

justice, exceed professional and ethical boundaries, and are a catalyst for eliciting false confessions (Gudjonsson, 2003b; Hutchinson, 2004; Leo, 1992; Libin, 2009; Mulgrew, 2005; Nowlin, 2004). Pundits say the self-incriminating statements are invariably induced by promises of wealth and professional advancement in a sophisticated criminal organization, not to mention avoidance of criminal sanctions by having the organization make the consequences of the crime disappear. Targets might not only intentionally overestimate their participation and culpability in the crime under investigation, but also distort or fabricate stories of previous misdeeds to portray themselves as worthy candidates to join a wealthy criminal organization or to protect their own safety (*Henry*, 2003, para. 44). Critics contend that these circumstances gravely undermine the reliability of confessions and could increase the chances that an innocent person might confess to a crime they did not commit.

In his analysis of undercover policing, Marx (1988) warns that "contemporary discussions of undercover work frequently offer either sweeping praise or categorical condemnation" without fully understanding the nature of covert operations (60), thus making the Mr. Big sting a salient topic for reflection. Greater awareness about the nature and scope of undercover practices undoubtedly raise important questions for social understanding and public policy (Marx, 1988, 15). Criminal justice policy and practice should be informed not by sweeping generalizations and a priori assumptions, but rather comprehensive and critical assessment. Thus, the purpose of this thesis is to advance the scope of investigation into Mr. Big—an intriguing undercover stratagem. In particular, this thesis seeks to examine how such a controversial and sometimes effective investigational technique has come to exist as a legitimate tool used by the RCMP and other police forces to investigate unsolved criminal cases in Canada. In addition, this thesis seeks to identify potential risk factors that could be instrumental in

the elicitation of unreliable, misleading, or inaccurate information from unwitting suspects in order to develop empirically based policy responses to prevent further miscarriages of justice in the Canadian criminal justice system.

Chapter Two of this thesis begins with a brief explanation of how this post-offence interrogatory technique falls within constitutionally acceptable limits of Canadian criminal law, mainly by circumventing the common law confessions rule, and in particular, the integral persons in authority requirement. This chapter also presents an overview of the extant literature on wrongful conviction (miscarriage of justice), identifying a multitude of causes of erroneous convictions and inadequacies of the criminal justice system and methods of prevention. Of significance to this thesis is a growing body of research suggesting that interrogation-induced false confessions are one of the more salient causes of erroneous convictions. Also vital is the literature focusing on the psychology of police interrogation and confessions. Since psychological methods of interrogation have progressed gradually from accusatory in nature to more subtle forms of deception and psychological manipulation, it is no longer unbelievable that persons might confess to crimes they did not commit. Despite the fact that “third degree” violence no longer exists, false confessions continue to occur with regular and disconcerting frequency.

At present, social science research has focused almost exclusively on interrogation-induced false confessions obtained in a custodial investigative environment (Bedau & Radelet, 1987; Borchard, 1932; Cassell, 1999; Drizin & Leo, 2004; Gross, Jacoby, Matheson, Montgomery, & Patil, 2005; Gudjonsson, 1992, 2003b; Inbau, Reid, Buckley, & Jayne, 2001; Kassin, 1997; Kassin & Gudjonsson, 2004; Leo, 1992, 1996a, 1996b, 1996c; Leo & Ofshe, 1998a, 2001; Ofshe & Leo, 1997a, 1997b; Scheck, Neufeld, & Dwyer, 2000; Warden, 2003). As Leo (1992) opines, non-custodial police

interrogations are seen as one of the most fundamental and overlooked forms of subterfuge (43). Not surprisingly, corresponding academic literature related to non-custodial undercover interrogation is nominal. Consequently, this thesis hinges on existing interrogation literature to assess whether or not it could be transposed to non-custodial undercover interrogation contexts or whether further theoretical development is warranted, thus highlighting an important gap in the research.

The findings of this social scientific investigation are the result of an ethnographic content analysis (Altheide, 1987). As such, Chapter Three discusses the methodological framework as well as the research decisions of this socio-legal analysis. Chapter Four presents a combination of the quantitative and qualitative trends unearthed in this analysis, as well as a discussion of those findings, taking into consideration the reliability or truthfulness of confessions derived from Mr. Big operations. While it is important to recognize the Mr. Big technique as a potential catalyst for procuring false confessions, the author does not propose to answer whether any of the disputed confessions found in this sample are indeed false. It is beyond the scope of this thesis to investigate fully whether the confessions are indeed true of false, not to mention outside of the researcher's area of expertise.

Chapter Five includes a general discussion of the strengths and limitations of the Mr. Big technique and the implications they may have in shaping the possible future of this undercover policing practice, and whether there is a permanent place for it in Canadian law enforcement. An analysis of emerging trends in judicial precedent over the past 16 years helped trace the emergence, advancement, and sustainability of this post-offence undercover interrogation technique, highlighting potential risk factors that could be instrumental in the elicitation of unreliable, misleading, or inaccurate information from unwitting suspects. This thesis concludes by putting forward for consideration several

recommendations for legal reform that could help prevent the elicitation of false confessions and further miscarriages of justice in the Canadian criminal justice system.

More generally, this study seeks to make a positive contribution to this burgeoning practice as well as to the public and political discourses regarding how to best minimize the likelihood of eliciting false confessional statements from innocent persons and the miscarriages of justice that may ensue (see Drizin & Leo, 2004, 929). This thesis also aims to provide criminal justice officials at all levels with a better understanding of the processes involved in producing erroneous confessions. While the results of this formative research may not provide any definitive answers, this study will devise more precise questions and a framework that should stimulate future research.

# CHAPTER TWO: A REVIEW OF THE LITERATURE

The Mr. Big investigative technique operates "on the edge of the legislative confines of the law", and falls within constitutionally acceptable limits of Canadian criminal law (Gorbet, 2004, 55). Through creativity and ingenuity, undercover operatives create the appearance of breaking the law; however, the improprieties police encourage or actively participate in are indeed lawful. Gorbet (2004) explains:

> The general premise which runs throughout this technique is that no real crime is committed. All of the participants, except the target, are police officers and the actions committed are fake and only intended to emulate the crime. Through the use of control of the target and numerous undercover operators, the police can effectively emulate a range of criminal activity (56).

Despite recommendations by the Law Reform Commission of Canada (1984a, 1984b) for reform, regulation and codification of the law governing the police questioning of suspects, the area continues to be governed by the common law (Brockman & Rose, 2006, 222; Bronitt, 2004, 36; Sherrin, 2005, para. 23). Absent comprehensive legislative regulation, the judiciary has assumed a critical role, "creatively fashioning new remedies from existing evidential and procedural rules" (Bronitt, 2004, 36). Yet as Sherrin (2005) points out, the courts "have merely demarcated (in fairly general terms) the outer boundaries of acceptable conduct, and have left the police to work out the best practices" (para. 23). Canadian jurisprudence has customarily permitted the police, in their endeavour to investigate crime, to engage in trickery so long as their actions do not shock the sensibilities of an informed community (*McIntyre*, 1994; *Roberts*, 1997; *Rothman*, 1982; *Unger*, 1993a). In *Mack* (1988), the Supreme Court of Canada was asked to consider the threshold limits on police misconduct, specifically, the point at

which the actions of the police exceeded the permissible common law limits. Mr. Justice Antonio Lamer (as he was then) stated for the court:

> One need not be referred to evidence to acknowledge the ubiquitous nature of criminal activity in our society. If the struggle against crime is to be won, the ingenuity of criminals must be matched by that of the police; as crimes become more sophisticated so too must be the methods employed to detect their commission (para. 15).[13]

He went on to say, "Obviously the police must be given considerable latitude in the effort to enforce the standards of behaviour established in the criminal law" (para. 17). Reflecting a similar sentiment, the British Columbia Court of Appeal, in *Moore* (1997), remarked that the courts "have recognized the importance of undercover techniques in the pursuit of legitimate law enforcement goals and have given the police considerable latitude in executing such strategies" (para. 20). The Supreme Court of Canada's endorsement of the Mr. Big operational method is buttressed by four noteworthy decisions, either affirming the Court's endorsement of its use or not criticizing its use.[14] These endorsements from Canada's highest court probably encourage police to engage in increasingly deceptive practices (Leo, 1992, 47).[15]

The police in other common law countries such as the United States and the United Kingdom, are not permitted to employ Mr. Big scenarios because they are considered coercive and an infringement of a suspect's constitutional rights (Hutchinson, 2007, A.1; Kari, 2006, S.1; *Osmar*, 2007, para. 55; Seyd, 2007, 23). In the U.S., prosecutors must prove the voluntariness of all statements made by the accused

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[13] In *Mack* (1988), Lamer J. set out the applicable test for entrapment (para. 126), and that definition does not include the "Mr. Big" strategy. Mr. Big investigations do not involve entrapment, as they are post-offence undercover operations to elicit confessions. In other words, the police have not instigated the offence but are attempting to apprehend the perpetrator of a crime that has already been committed.

[14] See the cases of *Fliss* (2002), *Grandinetti* (2005), *McIntyre* (1994), *Nette* (2001).

[15] In his acclaimed book *Undercover: Police Surveillance in America,* Marx (1988) states, "There is an interesting irony at work here: restrict police use of coercion, and the use of deception increases" (47).

(Brockman & Rose, 2006, 222; Uniform Law Conference Report, 1982, 175) and this would put most Mr. Big statements in jeopardy of being excluded as evidence. As noted by Williamson J. in *Proulx* (2005), "the English rules and practices with respect to undercover operations [also] limit the police more than do those rules and practices in Canada" (para. 37). Paradoxically, Canadian police officers have been permitted to conduct Mr. Big investigations in both the U.S. and Great Britain, with the assistance of local authorities, in order to gather evidence for trials that are held in Canada.

In March 1995, RCMP discovered the body of Stacey Koehler in the basement of her parents' home in Burnaby, British Columbia (Hunter, 2003, A.20). A co-worker, Michael Proulx, was suspected of being involved in her death but Proulx provided authorities with an alibi, which was later discovered to be false. By that time, Proulx had fled to Mexico and subsequently settled in England. Still believed to be the murderer, investigators felt their only option was to mount an undercover investigation with Proulx as the target. Under the strict guidance and direction of British authorities, Canadian officers conducted a Mr. Big operation and were able to successfully obtain a confession from Proulx. British authorities subsequently arrested Proulx "on a provisional warrant issued pursuant to the United Kingdom Extradition Act" (*Proulx*, 2005, para. 20). He was then read his rights by RCMP officers, and placed on a plane bound for Canada (para. 54).

In Canada, Proulx sought to exclude the self-incriminating statements made to undercover officers in England based on the notion that evidence obtained in a foreign jurisdiction should be ruled inadmissible as evidence at trial. Without deciding whether it would have been admissible in England, B.C. Supreme Court Justice Paul Williamson ruled that the Mr. Big undercover operation would not shock a "a reasonable, dispassionate person in [Canada], aware of the circumstances surrounding this case,"

and it was “hardly so grossly unfair as to repudiate the values underlying our trial system” (para. 52). He ruled the evidence admissible at trial (para. 52). Proulx pleaded guilty to second-degree murder and was sentenced to life with no parole eligibility for 13 years (Fraser, 2005, A.8).

Ironically, evidence from a Mr. Big operation in Canada was used against accused charged with murder in the United States (where evidence from Mr. Big operations are generally not admissible). In the early hours of 13 July 1994, Bellevue Police, in Washington State, were called to the Rafay residence, where inside the house police discovered the bodies of Tariq and Sultana, and their daughter Basma, who was barely clinging to life (*United States of America v. Burns*, 1997, para. 3).[16] Investigators immediately suspected Atif Rafay, son of Tariq and Sultana, and Atif’s close friend, Sebastian Burns of the murders but lacked sufficient evidence to support a charge against the two men. At the time of the murders, both co-accused “lived in West Vancouver and were at the material times Canadian citizens” (para. 2). Investigators alleged that the conspiracy to commit the murders occurred there as well (Baron, 2008c, A.11).

When Burns and Rafay returned home to Vancouver from Bellevue, the RCMP proposed joining forces with the Bellevue detectives under the *Mutual Legal Assistance in Criminal Matters Act* (Cooper, 2007). The RCMP mounted an elaborate Mr. Big undercover operation and obtained self-incriminating statements from both suspects. With assurances from Washington state prosecutors that the two men would not face execution if convicted, the alleged murderers were extradited to Washington State to face three counts of first-degree murder. The confessions elicited from this covert investigation were admissible as evidence at their trial.

[16] Basma Rafay would later succumb to her injuries.

Christopher Nowlin, an academic and practicing criminal defence lawyer, is one of few who have examined the Mr. Big post-offence undercover investigational technique. Subsequent to an analysis of four cases involving a confession obtained from a Mr. Big operation, he found that these post-offence undercover operations tend to produce unreliable, and at times, "patently false" confessions (394). Since targets do not fully appreciate the potential consequences of confessing, statements made in the context of a Mr. Big sting are not statements against the target's penal interest but rather are made in anticipation that the crime boss can make criminal problems go away (Nowlin, 2004, 413). This thesis returns to a more detailed examination of Nowlin's analysis later.

Prominent defence lawyer James Lockyer opposes deceptive interrogations conducted in the Mr. Big operations because the resulting confessions would require substantial extrinsic support to be considered reliable. Such support is rare (Hutchinson, 2004, RB.1; Mulgrew, 2005, B.1). Defence lawyer Daniel Brodsky, a member of the Association in Defence of the Wrongly Convicted (AIDWYC), says that it is customary for juries to convict accused persons subject to Mr. Big scenarios because they accept the widespread, intuitive notion that innocent persons would not implicate themselves in crimes they did not commit (Staples, 2007, A.13). Although most people find it difficult to believe that someone would confess to a crime they have not committed, research indicates that the phenomenon of false confession occurs with regular and disconcerting frequency (Bedau & Radelet, 1987; Drizin & Leo, 2004; Gross, Jacoby, Matheson, Montgomery & Patil, 2005; Leo & Ofshe, 1998a; Scheck, Neufeld & Dwyer, 2000; Warden, 2003). Notwithstanding this wealth of empirical evidence, this "psychological myth of interrogation" continues to dominate attitudes not only of the general populace but also of criminal justice officials (Drizin & Leo, 2004; Johnson, 1997; Kassin, 1997,

Kassin & Neumann, 1997; Kassin & Wrightsman, 1980, 1981; Leo, 2007; Ofshe & Leo, 1997b).

## The Confessions Rule: Canadian Law on Voluntariness

The Supreme Court of Canada, in *Oickle* (2000), revisited the contemporary confessions rule and the related common law limits on police interrogation in Canada. Given its recognition of the "growing understanding of the problem of false confessions" (*Oickle*, 2000, para. 32), the Court thus delineated a modernized process for assessing whether a confession should be admitted in evidence at trial. The confessions rule is designed to prevent the admission of statements made by an accused to a person in authority where there is reasonable doubt as to whether the statements are voluntary (*Oickle*, 2000, para. 47). Iacobucci J., for the majority, held that "it is important to keep in mind its twin goals of protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes" (para. 33).[17] The Court discussed four relevant factors the trial judge should consider when determining whether a confession is voluntary: 1) threats or promises, 2) oppression, 3) the operating mind requirement, and 4) other police trickery (paras. 48-67). If an accused person's statement is involuntary under any of these four factors, it is inadmissible. However, the requirement that admissions be voluntary applies only to statements made to persons in authority (Brockman & Rose, 2006, 222).

[17] Legal commentators have argued that the Supreme Court of Canada's decision in *Oickle* (2000) has transformed the substantive law in such a way that it has sanctioned the police to employ excessively coercive interrogation techniques (LeSage & Code, 2008; Stuart, 2001; Trotter, 2004). LeSage and Code (2008), in particular, draw attention to the fact these reforms have broadened the scope of admissibility of statements made by a suspect even "after repeated, lengthy and forceful interrogations, that most Crown counsel would likely not have attempted to introduce into evidence in an earlier era" (LeSage & Code, 2008, 9).

## The Person in Authority Requirement of the Confessions Rule

The Supreme Court of Canada's decision in *Hodgson* (1998) is the leading authority on the definition of persons in authority as it applies to the admissibility of confessions. According to Cory J., the persons in authority requirement "is carefully calibrated to ensure that the coercive power of the state is held in check and to preserve the principle against self-incrimination" (para. 29).[18] The law typically defines a person in authority as "Those persons whom the accused reasonably believes are acting on behalf of the police or prosecuting authorities and could therefore influence or control the proceedings against him or her…" (*Hodgson*, 1998, para. 48).[19] The test for determining whether an individual is a person in authority is "largely subjective, focusing on the accused's perception of the person to whom he or she is making the statement" (*Grandinetti*, 2005, para. 38). If a suspect is unaware of the true identity of the receiver's status, then the person is not considered a person in authority for the purposes of the confessions rule (*Hodgson*, 1998, para. 39).

Although the confessions rule is considered the primary legal safeguard in Canadian criminal law protecting against the admissibility of erroneous confessions (Sherrin, 2005, para. 23; *Oickle*, 2000, para. 47), this thesis will illustrate that there is a loophole in the substantive law that raises serious questions about whether the rule adequately protects against erroneous confessions and subsequent miscarriages of justice. The Mr. Big non-custodial interrogation technique is one of many circumstances

[18] See Penney, 2004, 294.

[19] The definition also extends to persons whom the confessor "reasonably believes are acting on behalf of the police or prosecuting authorities and could therefore influence or control the proceedings against him or her" (para. 34). That is, someone "allied with the state authorities and could influence the investigation or prosecution against the accused" (para. 35), and someone who is "acting in concert with the police or prosecutorial authorities, or as their agent, or as part of their team" (para. 47).

"in which the traditional rendering of the confession rule would permit the admission of unreliable statements" (Penney, 2004, 282).

## Wrongful Conviction: A Miscarriage of Justice

In *Oickle* (2000), the Supreme Court of Canada recognized that "One of the overriding concerns of the criminal justice system is that the innocent must not be convicted" (para. 36). The safeguards instituted in Canadian criminal law are ostensibly thought to protect against miscarriages of justice. Typically, a wrongful conviction is the result of errors or misconduct that allow someone who is *factually* innocent to be convicted and sentenced for a crime they did not commit (Schehr & Sears, 2005, 182).[20] According to the Honourable T. Alexander Hickman (2004), a series of checks and balances are instituted at all levels of the Canadian criminal justice process to prevent miscarriages of justice from occurring.[21] Despite these checks and balances, concern about erroneous convictions and the fallibility of an adversarial criminal justice system is corroborated by the high-profile wrongful conviction cases of Donald Marshall Jr., Guy Paul Morin, Steven Truscott, David Milgaard, Wilbert Coffin, Thomas Sophonow, Clayton Johnson, Ronald Dalton, James Driskell, Gregory Parsons and Romeo Phillion to name

[20] The adversarial criminal justice system is concerned with legal guilt (whether the Crown can prove the accused committed the offence within the rules of evidence) rather than factual guilt (whether an accused did indeed engage in the alleged behaviour) (Brockman & Rose, 2006, 6).

[21] For instance, police investigations are reviewed internally to assess whether or not officers have complied with procedural rules; serious criminal charges are often reviewed with the Crown before the laying of an information; the accused is entitled to full and timely disclosure of all material evidence of the Crown's case; depending on the election of the accused, a preliminary inquiry will be conducted to see whether sufficient evidence exists to commit the accused to trial (although section 577 of the *Criminal Code* allows the Crown to bypass the preliminary inquiry and proceed by direct indictment); finally, two levels of appellate court are able to review the decisions made by lower courts (see section 675 of the *Criminal Code*) (Hickman, 2004, 183-4). In British Columbia, Quebec and New Brunswick, prosecutors screen charges before they are laid by the police (Brockman and Rose, 2006, 75), perhaps providing even greater protection.

a few (Anderson & Anderson, 1998; Campbell & Denov, 2004; Denov & Campbell, 2005; Macfarlane, 2006; Sherrin, 2005; Trotter, 2004).[22]

Absent these prominent cases, however, systematic research on wrongful conviction in Canada has historically been nominal (Anderson & Anderson, 1998, 8; Brockman & Rose, 2006, 143; Campbell & Denov, 2004; Denov & Campbell, 2005, 225). American scholars, and more recently Canadian scholars, have identified numerous systemic factors that have contributed to erroneous convictions, including mistaken eyewitness identification, professional misconduct by criminal justice officials, misleading circumstantial evidence, erroneous forensic science, child suggestibility, the use of jailhouse informants, race and class bias (Anderson & Anderson, 1998; Bedau & Radelet, 1987; Borchard, 1932; Brandon & Davies, 1973; Denov & Campbell, 2005; Drizin & Leo, 2004; Drizin & Luloff, 2007; Gudjonsson, 2003b; Leo, 2005; Leo & Ofshe, 1998a; Loewy, 2007; Macfarlane, 2006; Martin, 2001, 2002; McMurtrie, 2005; Radelet, Bedau & Putman, 1992; Radin, 1964, Sherrin, 2005). While these factors are all vital to the overall understanding of wrongful convictions, this thesis is concerned with erroneous convictions resulting from interrogation-induced false confessions.

Notwithstanding the fact that the incidence of interrogation-induced false confessions is difficult to estimate (Cassell, 1998), Drizin and Leo (2004) suggest that the hundreds of cases that have been discovered and documented to date "understate the true nature and extent of the phenomenon" (919), and likely represent the tip of the iceberg (Anderson & Anderson, 1998, 9; Ofshe & Leo, 1997a, 191). What is known

[22] Numerous cases have resulted in commissions of inquiry including The Royal Commission on the Donald Marshall, Jr. Prosecution, Digest of Findings and Recommendations (Halifax: Queen's Printer, 1989); Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin (Toronto: Ontario Ministry of the Attorney General, 1998); The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation (Winnipeg: Manitoba Justice, 2001); and The Lamer Commission of Inquiry Pertaining to: Ronald Dalton, Gregory Parsons and Randy Drunken: Report and Annexes (Government of Newfoundland and Labrador, 2006).

about the phenomenon of false confessions to date has come from statistical analysis of archival and documentary records (Bedau & Radelet, 1987; Leo & Ofshe, 1998a; Warden, 2003; Drizin & Leo, 2004; Gross et al., 2005), experimental psychological research (Breau & Brook, 2007; Kassin & Neumann 1997; Kassin & Sukel, 1997; Redlich & Goodman, 2003), self-report interviews and surveys (Gudjonsson & Petursson, 1991; Gudjonsson, & Sigurdsson, 1999), and naturalistic observation (Gudjonsson, Clare, Rutter, & Pearse, 1993; Leo, 1996a, 1996b, 1996c). The results of these studies have shown that interrogator-induced false confessions have or are becoming one of the more prominent and enduring causes of wrongful conviction (Leo & Ofshe, 1998a; Drizin & Leo, 2004; Leo, 2007; Warden, 2003). According to Drizin and Leo (2004), police induced false confessions occur in 14% to 25% of documented wrongful convictions (907). Moreover, researchers have consistently found that false confessions are concentrated in the most serious indictable offences, and are a leading source of error in wrongful homicide convictions (Drizin & Leo, 2004; Gross, 1996; Leo, 2007; Macfarlane, 2006; Meissner & Russano, 2003).

The 1932 watershed study conducted by Yale University law professor Edwin Borchard is believed to be the first systematic study on miscarriages of justice (Drizin & Leo, 2004, p. 900; Gudjonsson, 2003b, p. 159; Harmon, 2001, p. 951; Leo, 2005, p. 203; Macfarlane, 2006, para. 14). A qualitative analysis of sixty-five American and British cases showed that innocent individuals were indeed wrongfully prosecuted, convicted, and incarcerated.[23] Not only did this study dispel the perception that innocent people were never wrongfully convicted, it also shifted the focus of the research question away from whether innocent persons were wrongfully convicted to questions of why this was

[23] Innocence was established by the following three factors: 1) the alleged victim turned up alive, 2) subsequent conviction of the real culprit, 3) discovery of new, independent evidence demonstrating the accused's innocence (Gudjonsson, 2003b, p. 159; Macfarlane, 2006, para. 15).

the case and what could be done to remedy this troublesome situation (Drizin & Leo, 2004, p. 901; Leo, 2005, p. 203). While Borchard's study did not identify interrogator-induced false confessions as a leading cause of wrongful conviction (likely because force and duress were common interrogation techniques at the time of his study), it is worth mentioning because Borchard initiated what has become a resourceful scholarship on the miscarriage of justice.

In subsequent decades, a series of books documenting various other alleged or proven cases of miscarriages of justice emerged, repeating similar arguments but documenting newer cases (Drizin & Leo, 2004, p. 901).[24] Although useful, they were based on anecdotal and descriptive accounts rather than rigorous scientific methods (Gudjonsson, 2003b, p. 159). No systematic, scientific studies documenting the causes, patterns, implications and consequences of miscarriages of justice emerged until the late 1980s (Drizin & Leo, 2004, p. 902).

Bedau and Radelet's (1987) groundbreaking article, "Miscarriages of Justice in Potentially Capital Cases", dispelled the common perception that factually innocent persons would not implicate themselves in crimes they did not commit. In their analysis of 350 cases where individuals were wrongfully convicted of capital or potentially capital crimes in the U.S. from 1900-1987, Bedau and Radelet (1987) discovered that interrogation-induced false confessions played a causal role in 49 (11.4%) of the 350 instances of miscarriages of justice (57).[25] In the years after the Bedau-Radelet study, scientific and technological developments in DNA testing, and its application to post-conviction cases, would reveal a surge of proven miscarriages of justice (Drizin & Leo,

[24] See Brandon & Davies (1973), Frank & Frank (1957), Gardner (1952), and Radin (1964).

[25] According to Bedau and Radelet (1987), a miscarriage of justice occurred in cases where "(a) The defendant was convicted of homicide or sentenced to death for rape; and (b) when either (i) no such crime actually occurred, or (ii) the defendant was legally and physically uninvolved in the crime." (45).

2004, 903; Drizin & Luloff, 2007, 257; Garrett, 2008, 56; McMurtrie, 2005, 1271). As a result, the social scientific investigation into miscarriages of justice ensued and gained even more momentum through the 1990s.

Leo and Ofshe (1998a) reviewed a sample of sixty cases of wrongful conviction resulting from alleged police-induced false confession throughout the United States, between 1973 and 1996.[26] Notably, there was no significant and/or credible evidence to corroborate the suspects' impugned confessional statements, and evidence supporting their factual innocence was "often substantial and compelling" (436). Based on the strength of the evidence against the accused, false confessions were classified into three categories: proven, highly probable, and probable false confessions (436-7). Based on this classification system, 34 (57%) were categorized as "proven false confessions", 18 (30%) were "highly probable" and 8 (13%) were classified as "probable false confessions" (Leo & Ofshe, 1998a, 444-9). What sets this study apart from other research on wrongful conviction is that it is the first to focus specifically on miscarriages of justice caused by police-induced false confessions (Leo & Ofshe, 1998b, 433-4). It is worth noting that 27% of the false confessors in this study were intellectually disadvantaged (213-4).

Warden (2003) analyzed the role of false confessions in known erroneous murder convictions in Illinois since 1970. Of the 42 cases examined, he found that 25 defendants (60%) confessed falsely. In other words, false confessions were the leading cause of wrongful conviction in the Illinois homicide cases studied. Had investigators diligently pursued information acquired in the early stages of their investigations, thirteen

[26] Criteria for inclusion in the study included: 1) the confession was coerced by police; 2) the confession statement formed the basis of the state's case against the accused; 3) the confession was not supported by any physical or reliable inculpatory evidence; and 4) other evidence, often substantial and compelling, factually supported the defendant's innocence (436).

(52%) of the wrongful convictions might have been avoided. One quarter may have been averted had defendants received effective assistance of counsel (Warden, 2003).

In 2004, Drizin and Leo published an unparalleled study entitled, “The Problem of False Confessions In the Post-DNA World”, in which they analyzed a total of 125 cases of proven false confessions in the United States between 1971 and 2002.[27] To avoid duplication in the cases reported in the aforementioned Leo-Ofshe study (1998a), the authors excluded from their sample the 34 proven false confession cases unearthed by Leo and Ofshe. In line with previous wrongful conviction research, an overwhelming number of false confessions occurred in more serious indictable offences, murder being the largest category (81%) distantly followed by rape (9%) and arson (3%) (Drizin & Leo, 2004, 944).

Results indicate that age and mental capacity of suspects are two vulnerability factors that increase the likelihood of falsely confessing to a crime they did not commit. One of the more troubling findings with respect to age was that suspects under the age of eighteen accounted for 40 false confessions (35% of the sample). Moreover, seven children under the age of fourteen gave false confessions during an interrogation (961). Their findings suggest that an age bias does exist, and that there is a correlation between age and the likelihood of eliciting a false confession (942). Drizin and Leo (2004) also found that intellectually disadvantaged persons were particularly vulnerable to falsely confessing when subjected to modern psychological interrogation techniques, identifying at least 27 (22%) intellectually disadvantaged defendants in their sample of false confessors.

[27] All 125 cases were categorized as proven because at least one piece of evidence positively established the suspect’s innocence beyond a reasonable doubt (Drizin & Leo, 2004, 928). Significantly, Drizin and Leo (2004) identified two recurrent sources that led to the exoneration of the factually innocent, including scientific evidence (46%), and the identification of the real perpetrator (74%) (953-4).

Notwithstanding the fact that individuals who suffer from cognitive deficits are disproportionately represented in false confession cases, Drizin and Leo (2004) report that an overwhelming number "of reported false confessions are from cognitively and intellectually normal individuals" (918). To date, the Drizin and Leo study contains the largest catalogue of cases that focus specifically on the phenomena of (proven) interrogation-induced false confession.

Most recently, Gross et al. (2005) identified a comprehensive catalogue of 340 exonerations of persons wrongfully convicted from 1989-2003. Significantly, 51 (15%) of the 340 erroneous convictions examined defendants who confessed to crimes they did not commit (544). Police coercion was seen as the cause of false confessions in 28 (55%) cases, while a mere 5 (10%) were volunteered. Akin to the study conducted by Drizin and Leo (2004), Gross et al. (2005) found that the most vulnerable groups of innocent defendants included youth and those with mental disabilities. Thirty-three false confessors were under the age of eighteen at the time of their confession. Astonishingly, nine of the juvenile exonerees were aged twelve to fifteen (545). False confessions were even more frequent among those with mental disabilities. Of the twenty-six persons who suffered from intellectual deficits and mental illness eighteen (69%) of them falsely confessed (545). One final note, both Drizin and Leo (2004) and Gross et al. (2005) found that at least 80% of the police-induced false confessions occurred in homicide cases and other high-profile felonies (Leo, 2007, 33).[28]

Until recent years, those who were wrongfully convicted were, according to Warden (2003), considered to be "regrettable anomalies in an otherwise well-functioning

[28] False confessions are likely to occur in more serious cases because of increased public and institutional pressures to resolve these crimes (Gross, 1996, 478; Leo, 2007, 32; Macfarlane, 2006, para. 121). While this is true, this statement might ignore the number of wrongful convictions obtained through efficiency and plea-bargaining (see Brockman & Rose, 2006, 79-80).

criminal justice system" (See also Anderson & Anderson, 1998, 10). The aforementioned studies, however, suggest that police-induced false confessions, and subsequent miscarriages of justice, are not as infrequent as once thought and occur with regular and disconcerting frequency (Denov & Campbell, 2005; Drizin & Leo, 2004; Gudjonsson, 2003b; Leo, 2007; Leo & Ofshe, 1998a; Sherrin, 2005).

## Causes of False Confessions

Given the fact that "third-degree" interrogation tactics "have faded into the annals of criminal justice history" (Kassin & Gudjonsson, 2004, 41), and have been replaced with more subtle forms of manipulation, deception, and coercion, it is no wonder that false confessions might be thought of today as unlikely and rare (Ofshe & Leo, 1997b, 983). Why factually innocent persons continue to implicate themselves in crimes they have not committed (high-profile felonies at that) is one of the more perplexing questions social science research has attempted to answer. According to Gudjonsson's (2003a) Interaction Model, there are numerous different causes, or different combinations of factors, that must be considered when evaluating cases of disputed confessions, and "each case must be considered on its own merit" (165) (See also Gudjonsson, 2003b, 193).[29] To fully grasp the complexity of this phenomenon, researchers have focused on two primary sources: modern psychological interrogation methods and the suspect's psychological vulnerabilities (Meissner & Russano, 2003; Sherrin, 2005, para. 43).

Although still in its infancy, the scientific research on interrogation and confession points to police over-zealousness, poor training and negligence as the principal causes of most false confessions (Anderson & Anderson, 1998, 12; Bedau & Radelet, 1987; Drizin & Leo, 2004, 917; Kennedy, 1986; Ofshe & Leo, 1997b, 983; Redlich & Goodman,

[29] Various factors include custodial pressures, interrogation techniques, behaviour of the interrogator, personal vulnerabilities of the suspect, and presence or absence of legal counsel.

2003, 143). Misdirected police training and negligence are perpetuated by authors of leading interrogation manuals[30] and police trainers, who, in the face of empirical research on interrogation and confession, argue that contemporary psychological interrogation methods do not lead innocent persons to confess to crimes they did not commit (Findley & Scott, 2006, 333; Gohara, 2006, 841; Gudjonsson, 2003b, 9; Leo, 2007, 33; Leo & Ofshe, 1998a, 492; Ofshe & Leo, 1997b, 983; Sherrin, 2005, para. 23; White, 1997, 108). It has even been suggested that "the more training that police get in interrogation techniques, the less likely they are to be aware of their possible fallibility" (Meyer & Reppucci, 2007, 776).

By its very nature, interrogation is a guilt-presumptive process, defined by Kassin and Gudjonsson (2004) as "a theory-driven social interaction led by an authority figure who holds a strong a priori belief about the target and who measures success by the ability to extract an admission from that target" (41).[31] Interrogation tactics create a "sequential influence process" (Ofshe & Leo, 1997a, 194), a cost/benefit analysis whereby a suspect evaluates the potential courses of action available, the relative short and long-term consequences attached to each of the options available to them, and the utility of value benefits, corresponding harms or gains attached to prospective courses of action (Drizin & Leo, 2004, 912; Gudjonsson, 2003b, 121; Ofshe & Leo, 1997b, 985-6). According to Gudjonsson (2003b), the decision to confess is governed by the "*subjective probabilities of occurrence of the perceived consequences*" (121), that is to say the

[30] According to Gudjonsson (2003b), both the Inbau, Reid and Buckley (1986), and Inbau, Reid, Buckley & Jayne (2001), texts have influenced numerous other interrogation manual authors.

[31] While outside the scope of this thesis, various interrelated but separate cognitive phenomena such as tunnel vision, confirmation bias, selective information processing, belief perseverance, and the avoidance of cognitive dissonance have been shown to affect criminal investigations (See Anderson & Anderson, 1998; Ask & Granhag, 2005; Burke, 2006; Findley & Scott, 2006; Gilbert & Malone, 1995; Gilovich, 1991; Gudjonsson, 2003b; Kassin, 2005; Kerstholt and Eikelboom, 2007; Klayman & Ha, 1987; Martin, 2002; Nickerson, 1998).

suspect's choices and behaviours are guided not by objective or even realistic consequences, but by what he/she subjectively believes might happen.

Gudjonsson and Clark (1986) proposed the concept of interrogative suggestibility to help account for individual differences in the way suspects respond to the pressures of police interrogation and custodial confinement. It is defined as "the extent to which, within a closed social interaction, people come to accept messages communicated during formal questioning, as the result of which their subsequent behavioural response is affected" (84).[32] The theory postulates that an individual's susceptibility to an interrogator's suggestions will depend on their cognitive processing capacity, or the coping strategies they are able to generate and implement when faced with the conditions of uncertainty, interpersonal trust and heightened expectations (Gudjonsson, 2003b, 348-350).

Psychological factors such as diminished cognitive functioning (low I.Q., poor memory capacity), mental disorders (mental illness, learning disability, personality disorder), personality traits (suggestibility, compliance, acquiescence) and abnormal mental states (anxiety, phobic problems, such as claustrophobia, depression, post-traumatic stress disorder, drug or alcohol intoxication or withdrawal symptoms), put some individuals at increased risk to give false self-incriminating statements while in police custody (Gudjonsson, 2003b, 316-320). A review of the extant psychological literature indicates that false confessions are most acute among adolescents and individuals believed to be suffering from developmental disabilities (i.e., learning or intellectual deficits, mental illness), owing to the fact that these two subgroups are more

[32] Gudjonsson (2003b) argues that this definition "provides the framework for a theoretical model that helps to further our understanding of the process and outcome of the police interview" (346). Their definition of interrogative suggestibility is all encompassing, taking into account five components of the interrogative process: social interaction; questioning procedure; a suggestive stimulus; acceptance of the stimulus; and a behavioural response to that stimulus (346).

suggestible and/or compliant, and typically lack the psychological resources necessary to resist the overwhelming pressures of interrogation (Drizin & Leo, 2004, 907; Gudjonsson, 2003b, 621; Gudjonsson & Henry, 2003; Kassin, 1997, 221-8; Medford, Gudjonsson, & Pearse, 2003; Ofshe & Leo, 1997b, 1117; Redlich & Goodman, 2003, 143).

Researchers have investigated the relationship between age and suggestibility and have found that, because of delayed cognitive and psychosocial development, adolescents are more likely to acquiesce and provide a false confession in order to escape the enduring, stressful or intolerable pressures of the interrogation process (Conti, 1999; Drizin & Leo, 2004; Everington & Fullero, 1999; Gudjonsson, 2003b; Gudjonsson & Henry, 2003; Gross et al., 2005; Gudjonsson & Singh, 1984; Leo & Ofshe, 1998a; Meyer & Reppucci, 2007; Redlich & Goodman, 2003; Richardson, Gudjonsson, & Kelly, 1995; Singh & Gudjonsson, 1992; Viljoen, Klaver & Roesch, 2005). Moreover, the major interrogation manuals recommend interrogators employ the same techniques with adults and youth alike (Feld, 2006, 222; Meyer & Reppucci, 2007, 761).[33]

The intellectually disadvantaged are also particularly vulnerable to the pressures of modern psychological interrogation techniques (Drizin & Leo, 2004, 971; Everington & Fullero, 1999, 212; Gross et al., 2005, 551). Drizin and Leo (2004) explain:

> Because of their cognitive deficits and limited social skills, the mentally retarded are slow thinking, easily confused, concrete (as opposed to abstract) thinkers, often lack the ability to appreciate the seriousness of a situation, may not understand the long term consequences of their actions, and tend to have short attention spans, poor memory, and poor impulse control (918).

[33] Meyer & Reppucci (2007) reported that, in a four-day, 32-hour training session with Reid Technique instructors, approximately 10 minutes of instruction were dedicated to the application of interrogation to youth suspects, "and this was to advocate the use of the same strategies with youth as with adults" (761).

Like adolescents, persons with intellectual deficits are less likely to understand and assert their legal rights, and lack the ability to understand the context in which interrogation occurs (Cloud, Shepherd, Barkoff, & Shur, 2002, 499-501; Everington & Fullero, 1999, 213; Gudjonsson, 2003b, 318). In addition, they have a desire to please others, especially those in a position of authority (Drizin & Leo, 2004, 918; Everington & Fullero, 1999, 213).[34] According to Everington and Fullero (1999), "This bias toward providing a 'socially desirable' response is so strong that many persons with mental retardation will literally tell the questioner whatever they perceive that he or she wants to hear" (213).[35] As a result, there is an increased likelihood they will provide unreliable, misleading, or erroneous statements to police.

## A Typology of False Confessions

Since there are diverse psychological reasons for why people confess to crimes they did not commit, there is a continuing discourse about the most suitable method to categorize the various types of false confessions. There are three prominent models put forth to explain why individuals succumb to the psychological pressures of interrogation. The most widely cited taxonomy is the Kassin-Wrightsman (1985) model, which is based on anecdotal evidence and psychological theories of attitude change (Gudjonsson, 2003b, 194). According to this framework, false confessions are classified into three psychologically distinct types: voluntary, coerced-compliant, and coerced-internalized (Kassin, 2008, 195).[36] A voluntary false confession is one in which a suspect devoid of police pressures (i.e., physical and/or psychological coercion), spontaneously offers a self-incriminating statement for a crime they did not commit (Kassin, 2008, 195). A

[34] Equally, persons with learning disabilities may "feel easily intimidated when questioned by people in authority" (Gudjonsson, 2003b, 318).

[35] See also Clare and Gudjonsson, 1993.

[36] See Kassin & Wrightsman (1985) for a detailed explanation of these three types of confession (76-8).

coerced-compliant confession results when an individual acquiesces to escape the enduring, stressful or intolerable pressures of the interrogation process "for some immediate instrumental gain" (Gudjonsson, 2003b, 196).[37] The coerced-internalized false confession occurs when an individual, "subjected to highly suggestive methods of interrogation" (Kassin, 1997, 226), is persuaded to believe that he/she has in fact committed a crime but has no recollection having committed it (Gudjonsson, 2003b, 196; Ofshe & Leo, 1997a, 208).[38]

Although Kassin and Wrightsman have unquestionably contributed to a better understanding of the nature of false confessions, this threefold typology is not without its criticisms. Significantly, not all compliant and internalized false confessions are coerced (Gudjonsson, 2003b, 201). Moreover, this model does not allow for certain types of confessions to be classified (e.g., someone who confesses to protect someone else).[39] The most effective way to overcome this criticism is to increase the number of categories, which is precisely what Ofshe and Leo (1997a) do with their alternative classification system. In order to distinguish between confessions caused by police coercion and those caused by stress experienced by the suspect being interrogated, Ofshe and Leo (1997a) created the *stress-compliant* and *coerced-compliant* false

[37] A form of social influence, compliance is "conformity that involves publicly acting in accord with social pressure while privately disagreeing" (Myers & Spencer, 2001, 210) and is done for instrumental purposes (gain reward or avoid punishment). This type of public capitulation can be traced to Asch's (1956) studies of conformity (group pressure) and Milgram's (1974) research on obedience to authority (Kassin, 1997, 225). This phenomenon is illustrated in the 1692 Salem witch trials, *Brown v. Mississippi*, 297 U.S. 278 No. 301 (1936), and the infamous Central Park jogger case (Drizin & Leo, 2004; Gudjonsson, 2003b; Russano, Meissner, Narchet, & Kassin, 2005).

[38] A deeper form of social influence, internalization *"*refers to a private acceptance of the beliefs espoused by others" (Kassin, 1997, 225), and is exemplified in Sherif's (1936) autokinetic studies on the formation of group norms (Kassin, 1997, 225; Myers & Spencer, 2001, 211-213).

[39] For an in-depth evaluation of the Kassin-Wrightsman model see Gudjonsson, 2003b, 201-203; and Ofshe & Leo, 1997a, 209.

confessions categories (Sherrin, 2005, para. 33).[40] One of the limitations of the Ofshe-Leo model of confessions is that it focuses largely on police interrogative pressure and interrogator-induced false confessions while ignoring factors such as the custodial environment itself, coercion from an external source (i.e., a spouse, family member, friend), and psychological vulnerabilities (i.e., low I.Q., high suggestibility and compliance, anxiety and phobic disorders, and personality disorder) (Gudjonsson, 2003b, 206). The Kassin and Wrightsman (1986) conceptual model also fails to address the police interrogative pressures and inducements found in non-custodial environments.

In a modified framework, Gudjonsson (2003b) retains the Kassin–Wrightsman threefold typology but replaces the term *coerced* with *pressured* because it is a more inclusive term that encompasses most types of false confessions. Unless there is irrefutable evidence of coercion, he argues that the term should not be used. Under Gudjonsson's bivariate classification system confessions are classified as *voluntary*, *pressured-internalized* or *pressured-compliant* (211), that is to say the model classifies the source of pressure placed upon the person being interrogated. As evidenced in the Kassin-Wrightsman model, not all compliant and internalized false confessions are coerced and may be a result of external pressures independent of police influence (Gudjonsson, 2003b, 201). And the source of pressure is categorized as *internal* (psychological need to confess), *custodial* (coming from the police or other agencies granted with arrest/detention powers), or *non-custodial* (coming from persons other than the police or officers acting in an undercover capacity) (Gudjonsson, 2003b, 212). However, Gudjonsson (2003b) cautions that classifying false confessions into psychologically distinct categories may not always be possible as elements from the three categories may overlap and, thus, are not exclusive (242).

[40] For a more thorough explanation of the Ofshe-Leo classification system see Ofshe & Leo, 1997a, 210-220.

Perhaps the greatest advantage of Gudjonsson's modified framework is that it recognizes non-custodial settings as a source of pressure. As alluded to in the introduction, Gudjonsson (2003b) conducted a lengthy, comprehensive analysis of the case involving Andrew Rose, and concluded that Rose's confession "was a pressured-compliant type of confession", which was likely false (581). The confession was coerced by undercover police officers purporting to be criminal figures in an elaborate criminal syndicate (581). Gudjonsson (2003b) explains:

> They encouraged Rose to participate in apparent criminal activities of that organization, psychologically manipulated his perception of the likely outcome in his forthcoming trial, played on his vulnerabilities and distress concerning his case and used threats and inducements to break down his persistent claims of innocence. The immense pressure that Rose was placed under, and the extreme distress he displayed during the three videotaped interviews, raises important ethical issues about the use of non-custodial interrogations in a case like this (581).

Indeed, it would be presumptuous to transpose his examination of the Rose case to other Mr. Big case files. For the present, one can take into consideration the fact that while there may be some variations in the Mr. Big scenarios, the thrust of the covert technique remains the same: undercover police officers adopt fictional criminal identities, posing as members of an authentic, criminal syndicate, with the overall aim of eliciting incriminating statements from the target of their investigation.

A review of the scientific literature on the psychology of interrogations and confessions indicates that Gudjonsson (2003b) is one of few experts to have evaluated the Mr. Big interrogation technique specifically, as well as conducted a formal psychological assessment of the suspects targeted in these undercover operations.

# CHAPTER THREE: RESEARCH METHODS

The purpose of this thesis was to advance the scope of research into the Mr. Big investigative technique, in an attempt to determine how this sometimes effective, yet highly controversial, undercover investigative tactic has come to exist as a legitimate tool used by the RCMP and other police forces across Canada. An analysis of emerging trends in judicial precedent over the past 16 years helped trace the emergence, advancement, and sustainability of this post-offence undercover interrogation technique. This was achieved through a comprehensive and iterative analysis of sixty-three legal decisions where a confession obtained from a Mr. Big investigation was tendered as evidence.

## Research Method

This exploratory investigation is based on an ethnographic content analysis of information contained in both the reasons for judgment of Canadian case law, and electronic and print media related to the Mr. Big operational method. Conceptualized by Altheide (1987), ethnographic content analysis is “the reflexive analysis of documents” (65). It is an iterative process that commences at the genesis of the research design and continues through sampling, the collection of data, coding, analysis and interpretation (Altheide, 1987, 68). One of its distinguishing factors is that it is “embedded in *constant discovery* and *constant comparison* of relevant situations, settings, styles, images, meanings and nuances” (Altheide, 1987, 68). Rather than delimiting the direction of the research by forcing numerical and narrative data into predefined categories (although categories are created at the outset to guide the initial data collection/analysis), one can

expect additional categories and variables to emerge throughout the course of the study (Altheide, 1987, 68). While it may lack rigidity, ethnographic content analysis is very much a systematic and analytical technique.

## Sample and Database Characteristics

The data in the present study were 63 written legal judgments in Canadian criminal cases where a confession was tendered as evidence at trial as a result of a Mr. Big investigation from 1992 to 2008 (See Appendix B for a list of the cases). There were a total of 72 individual accused in these 63 cases. Since the total population of Mr. Big operations is unknown, it was impossible to take a random sample of the cases. Rather, the researcher set out to obtain the entire population of cases that appeared in written court decisions between the first known case in 1992 through to 2008 (total population data set) (Palys & Atchison, 2008, 112). The decisions were selected because they share a common characteristic: that is, undercover police officers posing as members of a criminal organization were able to elicit a confession from a suspect about his or her involvement in a serious criminal investigation. This total population sampling design enabled "detailed exploration and understanding of the central themes and puzzles" (Ritchie, Lewis & Elam, 2004, 78).

The sixty-three reasons for judgment were systematically identified primarily through Quicklaw, an electronic legal research database containing significant coverage of Canadian legal judgments. Quicklaw assigns decisions a case treatment indicator symbol, which allows the researcher to obtain comprehensive case histories and treatment coverage of cases. Quicklaw allows one to "note up" a decision with *Quick*CITE to determine how that decision has been treated in subsequent cases. This exercise sometimes led to other related cases. To ensure that an exhaustive search was performed, the researcher, in the present study, consulted supplementary legal

databases, such as each Canadian province and territory's law courts website,[41] and that of the Canadian Legal Information Institute (CanLII).[42] Incidentally, these supplemental searches did not return any additional cases.

While legal databases are a "fruitful source of data for analysis" (Palys, 2003, 240), there are limitations associated with case law analysis. Not every case that appears before the judiciary is entered into the database. According to Busby (2000), "judicial practices on the publication of reasons vary across Canada" (para. 11). Formal written reasons for trial decisions are issued in only a small number of cases; they are generally provided orally and are rarely transcribed (Busby, 2000, para. 11). In addition, there is little reported when the accused are tried by a jury. Moreover, cases where guilty pleas are entered are generally excluded from these databases unless a sentencing decision is published.

In an effort to compile as much source material on each case as possible, the researcher gathered supplemental data on the 63 criminal cases from various electronic and print media sources. Journalistic reports were accessed through two specific databases: *Canadian Newsstand* and *CBCA Current Events*, both of which provide a broad scope of Canadian current events, and full text of over 150 Canadian newspapers from Canada's leading publishers (Proquest, 2009).[43] News media also proved to be "a fertile source of data" (Drizin & Leo, 2004, 927). Not only did media reports provide

[41] Each province maintains a website of their respective provincial, supreme and appellate courts. If a particular province's law courts website does not publish its judgments directly, they can be found at the Canadian Legal Information Institute's (CanLII) website. For example, the Nunavut Court's website notifies the reader that its decisions can be found at CanLII and gives a direct link to this database.

[42] CanLII is a non-profit organization created and managed by the Federation of Law Societies of Canada whose goal is to provide public access to Canadian law free of charge. Also, according to the Québec Courts website, the decisions of the Courts delivered since 1963 are available upon subscription at www.azimut.soquij.qc.ca. The decisions of the Court rendered since January 1, 2000 are available, free of charge, at www.jugements.qc.ca.

[43] See more on ProQuest at:
http://www.proquest.com/en-US/catalogs/databases/detail/cbca_currentevents.shtml

sufficient insight into the fundamental mechanics and historical context of Mr. Big, but they also made available additional insights not provided by case law analysis alone, thus helping to complete the results.[44] In addition, the recent coverage in television media, namely investigative reports from Canadian and American television networks, (i.e., CBC's *The Fifth Estate*, and CTV's *W-5*, and CBS's 48 Hours Mystery), proved to be valuable sources of information regarding the Mr. Big technique.

Like Drizin and Leo (2004), this researcher, where possible, verified the factual assertions of media details and descriptions about the cases in the sample by comparing newspaper articles with their respective cases (927). For the most part, news media reports were factually correct, and succinctly covered all the salient points of the case. Despite admonition from some, that relying on secondary sources compromises the validity of research findings (Cassell, 1999; Gudjonsson, 2003b; Leo & Ofshe, 2001; MacEllven, 1986), the use of multiple data sources (i.e., case law and journalistic reports) ensures that the qualitative data is reliable and valid because it incorporates multiple constructions of reality into the research (Golafshani, 2003, 603).

## Data Collection

The first stage of this research project began with a canvass of newspaper articles so that the researcher could gain a better understanding of the Mr. Big investigative technique as well as the necessary information to search for relevant case law. Following a review of those newspaper reports, several high-profile cases emerged and were subsequently retrieved from Quicklaw. After a preliminary read of these documents, three distinctive and recurring terms identifying the Mr. Big strategy emerged. Initial search parameters used to select the legal decisions were the following

[44] Secondary sources were used to supplement, not supplant, the original criminal cases.

key words: 1) “Mr. Big”, 2) “Big Boss”, and 3) “Crime Boss”.[45] While these terms formed a consistently applied criterion for inclusion, they were not present in every decision. Nonetheless, each decision typically included a detailed description of the undercover ruse, which the researcher was able to identify as a result of the preliminary canvass of journalistic reports and judgments.[46]

Next, the reasons for judgment were revisited and scanned for emerging categories and themes. This revealed a series of recurring evidential and procedural issues raised by the use of this undercover tactic, including the Canadian law on voluntariness of confessions, and its relation to the persons in authority rule; the distinction between a circumstantial guarantee of trustworthiness and the ultimate reliability of self-incriminating statements; hearsay evidence and the principled approach to it; evidence which tends to show bad character or a criminal disposition; whether or not the Mr. Big technique is an abuse of process which would shock the conscience of the community; whether the judiciary is empowered to order bans on the publication of information related to this operational method; and expert opinion evidence on the phenomenon of false confessions, and more specifically, the trustworthiness of confessions elicited from Mr. Big operations.

Once the evidential and procedural issues were identified, a preliminary coding framework was established (See Appendix A for the coding scheme). As new categories

[45] These search terms were also entered into the Québec judgments database. However, the one case emanating from Quebec, *Lepage* (2005), did not refer to Mr. Big *per se*. So the recurring terms from that case, for example, “l'opération d'infiltration” and “un(e) agent(e) d'infiltration”, were entered into the database and the cases returned from this search were scrutinized and there were no additional cases.

[46] For example, in *Simmonds* (2000), Mr. Justice Smith described the Mr. Big strategy without using the search words: “In January 1999, the R.C.M.P. implemented an undercover police operation with Mr. Simmonds as the target. The undercover operators portrayed themselves to Mr. Simmonds as being part of a sophisticated criminal organization. During a series of meetings between January and April 1999, Mr. Simmonds was included in discussions, plans and assignments for a variety of fictitious criminal transactions, some of which had the appearance of involving guns and drugs” (para. 7).

and variables emerged, the coding framework was modified and the sample was re-examined. As already alluded to, reflexivity in research is an endless process of critical reflection (Guillemin & Gillam, 2004, 274). Indeed, this inductive logic prevented the researcher from delimiting the direction of the research by forcing numerical and narrative data into predefined categories. Data coding and analysis was done with SPSS statistical software.

## Ethical Considerations

Guillemin & Gillam (2004) distinguish between two different dimensions of research ethics, which they term procedural ethics and "ethics in practice" (263). The former refers to the traditional seeking of approval from a research ethics board, whereas the latter pertains to "the everyday ethical issues that arise in the doing of research" (Guillemin & Gillam, 2004, 263). Since the data in this research are comprised of case law and news media reports (sources that are readily accessible through the public domain), and not human subjects, this research design is compliant with Simon Fraser University's ethics policy, R20.01. This does not mean, however, that the study completely free of ethical concerns.

For instance, one must take careful steps to avoid the deliberate omission or fabrication of data to support or refute the findings, faulty data collection and analysis, and inaccurate reporting of findings (Maxfield & Babbie, 2008). Paying close attention to the "ethics in practice" dimension of research ethics helps to ensure that research integrity is maintained at all stages of the research process.

The provision of an extensive account of the data collection and analysis will help to avoid foreseeable problems for future researchers, which is important "for determining potential sources of bias, errors, or problems with internal or external validity" (Frankfort-

Nachmias & Nachmias, 2000, 279). This research may also assist in refining the methodology for use in subsequent studies.

# CHAPTER FOUR: RESULTS

## Quantitative and Qualitative Trends

To recapitulate, the main objective of this exploratory study was to advance the scope of investigation into this post-offence undercover interrogation technique, and to show how, legally, it has come to exist as a legitimate, (allegedly) last-resort technique to investigate serious criminal offences. This chapter presents both the quantitative and qualitative findings generated by an analysis of the sixty-three criminal cases where a confession was gathered as evidence as the result of a Mr. Big investigation.

### Demographic Data

Of the 72 accused in these 63 cases, 69 were men, while only three of the targets were women.[47] Concerning the age breakdown of accused persons, two of the targets were juveniles, defined as persons under the age of eighteen according to the *Youth Criminal Justice Act*. The age of the remaining accused in the sample ranged from 19 years of age to 59 years.[48]

Table 1 below presents the geographic location of the offence/trial in this study. Consistent with reports that the technique originated in British Columbia, 48 of the 63 cases examined were heard in British Columbia, five of the cases were heard in Manitoba, and four cases were heard in Alberta. Two cases took place in Newfoundland and one case each occurred in Saskatchewan, Ontario, Quebec and New Brunswick.

[47] There were two co-accused in 9 of the 63 cases scrutinized.
[48] Information on age was available for 63 out of the 72 accused.

**Table 1: Geographic Location of Offence/Trial**

| Province | Frequency | Percentage |
|---|---|---|
| British Columbia | 48 | 76.2% |
| Alberta | 4 | 6.3% |
| Saskatchewan | 1 | 1.6% |
| Manitoba | 5 | 7.9% |
| Ontario | 1 | 1.6% |
| Quebec | 1 | 1.6% |
| New Brunswick | 1 | 1.6% |
| Newfoundland | 2 | 3.2% |
| Total | 63 | 100% |

In *Dix* (2001), Sergeant Greg Smith, in charge of Undercover Coordination for the "K" Division of the RCMP (Edmonton, Alberta), testified that these undercover operations are "often used as a last resort technique in homicide investigations. They are inherently dangerous and are reserved for the most serious criminal offences" (para. 14). The results show nothing to refute the aforementioned claim that the police resort to this technique when traditional investigative procedures have proven ineffective and unsuccessful. The researcher found support for this claim in 36 cases.

The average time lapse between the commission of the offence and the commencement of the undercover operation was 52 months (median=15 months). In all but two cases, the Mr. Big technique was used to investigate unsolved homicides. In *Carter* (2001) the accused was charged with conspiracy to commit murder, counselling murder, and attempted murder. In *Joseph* (2000), both co-accused were charged with two counts of attempted murder (para. 1).[49]

Since murder is a serious indictable offence listed in section 469 of the *Criminal Code*, the accused must be tried in a superior court of criminal jurisdiction by judge and

[49] The co-accused were also charged with the use of a firearm in commission of an offence; discharging a firearm with intention to wound, main or disfigure any person; aggravated assault in respect of both alleged victims; and possession of a weapon for a purpose dangerous to the public peace (para. 2).

jury, with one exception (Brockman & Rose, 2006, 26).[50] The exception is that an accused may be tried by a superior court judge without a jury, provided both the accused and the Attorney General consent (section 473). Table 3 below presents the findings of whether the accused was tried by judge and jury or by superior court judge alone.

**Table 2: Whether The Accused was Tried By Judge And Jury or Judge Alone**

| Election | Frequency | Percentage |
|---|---|---|
| Judge and Jury | 43 | 68.3% |
| Judge Alone | 20 | 31.7% |
| Total | 63 | 100% |

There was no indication in any of the cases as to why the accused and the Crown agreed to have the accused tried by judge alone. However, one could conclude that the accused might be so motivated because the admission of the undercover operation narrative (the surrounding circumstances under which the accused's confession was made) in its unedited entirety, is evidence which tends to show bad character or a criminal disposition on the part of the accused, which has been shown to have a highly prejudicial effect on juries (Sopinka, Lederman, & Bryant, 1999, 471; also see Nowlin, 2005, 2006).

Given the inherently prejudicial nature of the post-offence undercover operation, the accused might have a better chance of acquittal if tried by a superior court judge alone.[51] Table 3 shows that a finding of guilt is more likely when the accused person chose a trial by judge and jury. Eighty-six percent of accused tried by judge and jury were convicted compared to only 48% of accused tried by judge alone.

[50] Section 471 of the *Criminal Code* states that, "Except where otherwise expressly provided by law, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury".

[51] See Williams J.'s analysis in *Perovic* (2004b) at paras. 25-27, which will be discussed in greater detail below.

**Table 3: Verdicts of Trials by Judge and Jury, and Judge Alone**

| | | Trial by | |
|---|---|---|---|
| | | Judge and Jury | Judge Alone |
| **Judgment** | Guilty | 43(86%) | 10(48%) |
| | Not Guilty | 6(12%) | 5(24%) |
| | Pleaded Guilty | 1(2%) | 6(28%) |
| Total Accused Persons (n=71)[52] | | 50 (100%) | 21(100%) |

In November 2008, a lawyer representing the RCMP reported that more than 95 per cent of the Mr. Big cases that are prosecuted result in a conviction (Baron, 2008a, A.4).[53] As Table 4 indicates, a guilty verdict was reached in 46 cases, while a guilty plea was entered in eight cases, bringing the total guilty verdicts to 54, or an 86 per cent conviction rate. While this figure in the present study is somewhat lower than that which the police report, the percentage differential could be attributed to a larger number of negotiated guilty pleas (see Brockman & Rose, 2006, 79-80) that did not make it into the Quicklaw database. Though it was not stated why eight of the accused pleaded guilty, one could infer that a guilty plea was the result of either an overwhelming body of evidence against the accused, or an effort to avoid an anticipated harsher sentence following a trial (Anderson & Anderson, 1998, 23).

**Table 4: Judgments**

| Verdict | Frequency | Percentage |
|---|---|---|
| Guilty | 46 | 73% |
| Pleaded Guilty | 8 | 12.7% |
| Not Guilty | 9 | 14.3% |
| Total | 63 | 100% |

[52] It is unclear as to whether the accused in *Therrien* (2005) elected to be tried by judge and jury or superior court judge alone at the time he entered a guilty plea and therefore the total number of accused in this table is 71, not 72.

[53] At this time, the researcher is not able to estimate the frequency of cases that have gone before the courts.

It has become apparent that the use of evidence from Mr. Big operations is not limited to those standing trial, but may also extend to witnesses. In *Ferber* (2000), a witness who was the subject of a Mr. Big operation refused to testify at the accused's trial because he feared that "he, his wife and baby son were all at grave physical risk if he testified" (para. 21). A *voir dire* was held to determine if his statements (some of which were made during the undercover operation) were admissible under an exception to the hearsay rule as "KGB statements". The trial judge excluded these statements commenting that, "This Court is not of the view K.G.B. authorizes the use of this kind of hearsay against accused persons without the protection of cross-examination" (para. 76).[54] These cases are beyond the scope of this thesis but are used to illustrate the net-widening effect of Mr. Big scenarios.

## Methods of Initiating Contact With The Target

The intention of the first operational scenario is to make contact with the target, in an attempt to establish the operative's credibility as a member of a sophisticated criminal syndicate, and to befriend the target in the hopes of forming a relationship that could result in the target disclosing inculpatory statements which would advance the investigation (Baron, 2008a, A.4; *Cretney*, 1999, para. 10). During the first "accidental" meeting, the operative is often in need of assistance and aims to enlist the help of the targeted suspect. What follows are four recurring methods of initiating contact with the suspect that emerged from the analysis: 1) the operative meets the target in police custody; 2) the target is informed that he or she is a "grand prize winner" in a contest; 3) the operative and target meet at the suspect's place of employment/school; and 4) the undercover officers stage a breakdown of their vehicle.

[54] Also see *Sihota* (2009), paras. 7-9, where the witness from the Mr. Big operation was subjected to cross-examination but his evidence was given little weight.

## Police Custody

Recruiting suspects while in custody was one of the most prevalent of tactics, occurring in nine cases. Illustrated in *T.C.M.* (2007), the target was one of many who were alleged to have been involved in a fatal shooting in front of the Argyll Hotel in the 100-block of West Hastings Street, Vancouver, British Columbia (para. 6). The operation began when police officers arrested T.C.M. and placed him in a police wagon and then a holding cell with an undercover operative, who impersonated a wealthy criminal "engaged in money-laundering and other high-level financial or similar crimes" (para. 12). Following his release from custody, the operative informed the target of potential employment opportunities with the organization (para. 12). The target would be taken in by the undercover ruse and would partake in several scenarios (para. 13).

In order to win the trust of George Clayton Mentuck, the RCMP hired Douglas Brau, a prisoner at Brandon Correctional Institute (BCI) at the same time as Mentuck, to act as an informant and aide to the operation (Mentuck, 2000b, para. 74). He visited the accused four times prior to his release and was tasked with selling Mentuck on the possibility of working with Mr. Brau in a criminal organization following his release (para. 75). On the day of his release from police custody Brau picked Mentuck up and the two travelled to a dwelling in Brandon, which was the RCMP's front house (para. 75). Mentuck was introduced to an RCMP officer who acted as both Mentuck and Brau's boss in the criminal organization. As a sign of good faith, the boss loaned the target $100.00 to buy clothes, since the only clothing he had was that which he was wearing upon his release from custody (para. 76). Undercover operatives were able to gain the target's confidence, and Mentuck was taken in by the ruse through to the end.

## Contest Winner

In five cases, the targets were approached by marketing company representatives and informed that they were winners in a contest. In *Bridges* (2005), undercover operatives went door-to-door in the suspect's neighbourhood posing as employees of a marketing company. Bridges was approached and asked to participate in a survey. As a result of his participation, the accused was told he and several others had won an all expenses paid trip to a Calgary Flames National Hockey League (NHL) game. Bridges attended the game with the other grand-prize winners who were undercover police officers. During the game, one of the officers was able to befriend the accused and over the next few months, the undercover officer was able to convince Bridges he was a member of a criminal enterprise. Bridges was then recruited and employed by the operative on several occasions (para. 3).

In December 2000, two undercover officers approached Jean-Paul Aubee's apartment under the guise of marketers working for a legitimate beer company. He was asked to take part in a taste test and was then given instant scratch tickets. The scheme was designed to have Aubee win a free case of beer and have his scratch ticket entered into a grand prize draw, an all expenses paid trip to a Vancouver Grizzlies NBA game (Bernhardt, 2003, 5).

In a similar context, following a two-month program of surveillance, a female undercover operator approached Christine Lepage purporting to be a door-to-door salesperson promoting beauty products (Cherry, 2005, A.8). By purchasing cosmetics, Lepage was entered into a draw for a three-day trip to a spa in Montebello, Quebec. She, too, was the winner of the purported contest. As Cherry (2005) describes, it was on this holiday "that the RCMP began weaving a fake world around Ms. Lepage, slowly introducing her into what she thought was an organized crime gang" (A.8).

## Place of Employment/School

In five cases, RCMP operatives endeavoured to make contact with the target at their place of employment/school. Jason Dix was employed as a scale technician at Pacific Scales, where he was responsible for sales, installation and servicing of the industrial scales (*Dix*, 2002, para. 15). Investigators made use of this opportunity to initiate contact with Dix. An undercover operative, claiming to be a member of an illicit criminal organization involved in money laundering and other illicit activities, approached Pacific Scales looking to buy a scale for his legitimate construction-development business (para. 119). The undercover officer attempted "to have the Plaintiff provide services to the operative relating to his expertise in scales 'under the table'" (para. 120). While Dix turned down this offer, he did accept the operative's proposition to help him build a deck onto his home. Dix was soon introduced to the activities such as money laundering, trafficking in drugs, and various other illicit activities.

To initiate contact with Ronda Black, an undercover operative hung around Summit Career College, where Black was enrolled. Her cover story was that she was taking a correspondence course (at another institution) and was in search of a tutor (*Black*, 2007, para. 146). One day, in the parking lot, the undercover operative initiated a scheme whereby she purportedly locked her keys in her vehicle. She asked Black, who was fortuitously walking across the parking lot, if she would be willing to give her a ride to pick up a spare set of keys (para 147). Black agreed, and the two became acquaintances. Undercover officers were also successful at recruiting Paul Forknall and David Lowe at their places of employment.

## I Need Help With a Flat Tire

In two cases, RCMP operatives were able to initiate contact with the target by staging a breakdown of their vehicle near the residence of the suspect. In *Unger*

(1993a), to initiate contact with the target two undercover officers staged a breakdown of their vehicle just outside a farm in rural Manitoba where the accused was staying (para. 19). As a result, RCMP officers were able to establish a personal relationship with Unger (para. 21). In *Hathway* (2007), the RCMP initiated contact with the target by having a female undercover operative knock on his door claiming to have a flat tire (para. 12). From there, the suspect was introduced to other members of the purported criminal syndicate, and was engaged in the day-to-day operations of the organization. Lastly, an undercover operator orchestrated a breakdown outside the dwelling of Peter William Fliss, a suspect in the first-degree murder of Jo Anne Feddema. Also part of the initial relationship building process, the undercover operator asked Fliss if he would be willing to store equipment for a marijuana grow operation, and help the operative find a dwelling to rent (*Fliss*, 2000, para. 46).

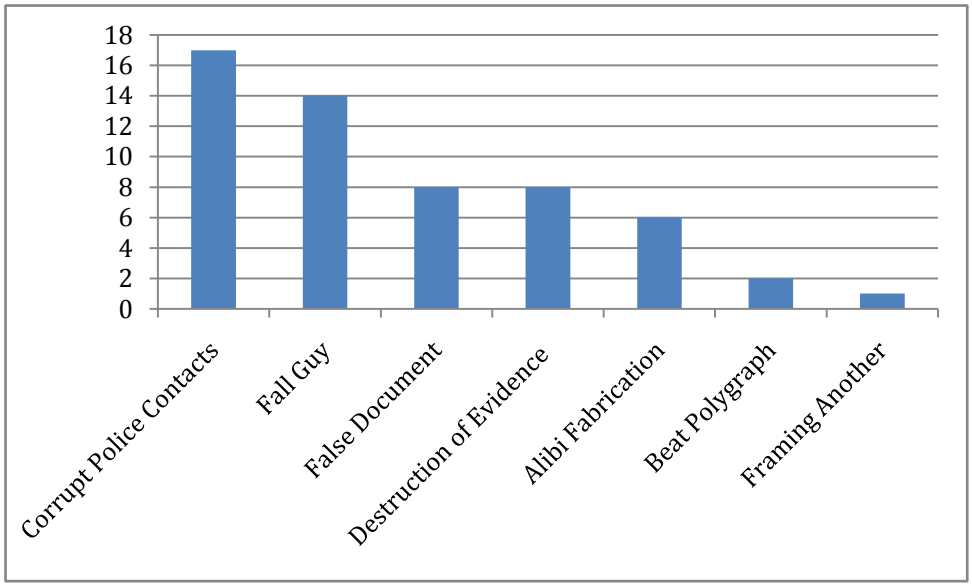
Other techniques that emerged from the analysis include meeting the target in a drinking establishment, the use of a third party to initiate contact with the target (i.e., co-accused, informant, girlfriend, mother), and most unsettling, making contact with targets at a detoxification facility for rehabilitation of a drug and/or alcohol abuse problem. Regardless of the method chosen to initiate contact with the target, the purpose of the initial meetings is to introduce the undercover operator and the criminal syndicate to the target.

## Methods Used to Procure a Confession

The courts have sanctioned the use of deceptive police methods in a non-custodial context, and law enforcement agencies have effectively pushed the boundaries of acceptable interrogation practices. That is to say, the use of subterfuge, holding out strong inducements, and veiled threats of violence, are tolerated in the investigation of particularly serious crimes so long as the tactics are not offensive to the integrity of the

judicial process (*McIntyre*, 1994; *Roberts*, 1997; *Rothman*, 1982; *Unger*, 1993a). Seven distinct methods for obtaining confessions emerged from the analysis. They include: 1) the use of corrupt police contacts; 2) the introduction of a "fall guy"; 3) the production of false documentation; 4) the claim of authority to destroy physical evidence; 5) an offer to fabricate an alibi; 6) an offer to enlist the help of an "expert" to help the target defeat lie-detector test; and 7) an offer to frame someone else. These data are presented in Figure 1. As evidenced in the following exemplars, the tactics employed are not mutually exclusive, and undercover operatives may use a combination of strategies.

**Figure 1: Techniques Used To Procure A Confession**




## Corrupt Police Contacts on the Organization's Payroll

Employed in 17 cases, this ruse involves the boss and/or his associates suggesting that they, as criminals, have sources within police departments who grant them access to sensitive police information, which helps undercover operatives check the veracity of their target's admissions. Targets are also informed that the inside contacts can, for example, destroy incriminating evidence to help steer the murder

investigation away from the target. “Tim”, the undercover RCMP operative posing as the main contact for the criminal organization in *Redd* (1999), informed the target that the organization had contacts that permeated all levels of the criminal justice system “including police, judges, even personnel in the prosecutor's office” (para. 160).

In *Grandinetti* (2005), undercover officers employed a standard Mr. Big scenario operation posing as an “international organization involved in drug trafficking and money laundering” (para. 7). The criminal enterprise attempted to gain Grandinetti’s confidence but was unsuccessful. After several failed attempts to get the accused to talk about his aunt’s murder, investigators tried to convince Grandinetti “that they had contacts in the police department who were prepared to act unlawfully, and that they had been able to use those contacts in the past to influence an investigation” (para. 9). To demonstrate this ability, undercover officers used their corrupt police contacts to find out the name of the lead investigator on the Grandinetti murder case. Operatives then suggested that the organization could steer the murder investigation away from the target, but that he was a liability to their organization because of the ongoing investigations. They communicated to him that he would lose out on a profitable career as the organization’s “Calgary contact”. Grandinetti subsequently made inculpatory statements regarding his involvement in the murder of his aunt, and then led undercover officers to the location where his aunt was killed (para. 10).

### The Fall Guy

In 14 of 63 cases, RCMP operatives proposed to have a confederate suffering from a terminal illness take the fall for the crime(s) under investigation, provided the target supply Mr. Big with adequate details to make the confession believable. The target is told that the even the smallest, mundane details are absolutely necessary

because the fall guy would likely undergo a series of police interviews before accepting the fall guy's admission of guilt (*Mentuck*, 2000b, para. 90).

In order to secure the murder weapon from suspect Michael Caster, RCMP operatives suggested a "Henry fall guy" plot (*Caster*, 1998, para. 8). Henry was a terminally ill employee of the criminal syndicate who was prepared to take the blame for the murder in question so long as the organization would take care of his family financially. The intent was to have Caster produce the murder weapon so that Henry could put his fingerprints on the gun, subsequently linking him to the murder. In addition, the crime boss offered to provide him with an alibi for the time of the murder (*Caster*, 1998, para. 9). Caster, wary that his friends were undercover police officers, was reluctant to go along with the proposed Henry scenario. To help him develop more comfort and trust of the organization, operatives engaged Caster in a major criminal undertaking, a purported off-loading of hashish (paras. 10-11).

### Producing a Fictitious Internal Police Memorandum

After several failed attempts to elicit a confession from Sebastian Burns and Atif Rafay concerning their roles in the Bellevue murders of Rafay's family, Mr. Big advised the accused that police secured vital DNA evidence from the crime scene, which implicated them in the murders. At a meeting between Burns and Mr. Big, the boss revealed a fabricated police document purporting to establish his involvement in the murder of the Rafay family. The document, written on official Bellevue Police Department letterhead, claimed that hair found at the murder scene incriminated Burns in the murders. This ruse was also designed to impress upon Burns and Rafay that undercover operatives had connections with corrupt Bellevue officers (Jiwa, 2004, A.24). Mr. Big then suggested he would "set fire to the records room of the Bellevue police department, switch Burns' hair samples at the crime lab, and get an East Indian to

confess to the murder" (Ogilvie, 1996, A.5). Following his appraisal of the document Burns disclosed his and Rafay's role in the murders (*United States of America v. Burns*, 1997, para. 4). The following day, Rafay was brought into the hotel room where Burns not only showed him the report but also informed Rafay that he disclosed everything to Mr. Big. It was then suggested to Rafay that he explain his role in the homicides because "Haslett [Mr. Big] needed to trust Rafay not to inform on Burns" (para. 4). When Rafay admitted to killing his family for money, Mr. Big said: "Hey, don't be embarrassed. Everything I do is for money. I don't give two f---s what you did to your family" (Baron, 2008a, A.4).

In *Forknall* (2000), police, under the guise of a criminal organization intending to receive a large shipment of drugs, offered both targets an opportunity to earn $20 - $30,000 for helping to offload the shipment so long as they checked out and were found to be suitable to join the organization (para. 7). During a purported organizational meeting, the crime boss and his assistant showed one of the targets fabricated documents, which had the appearance of being extracted from the Police Information Retrieval System (PIRS), containing information that established Copeland and Forknall's involvement in the first-degree murder of Tiffany McKinney (*Forknall*, 2000, para. 9). Both Copeland and Forknall continued to tell different stories about the disappearance of the victim. Police then initiated a meeting between the co-accused, Mr. Big, and an undercover police officer posing as someone within the organization that had expertise in disposing of bodies and covering traces of crime (para. 12). This tactic, combined with a reiteration about the importance of honesty and trustworthiness, persuaded both men to independently tell police that they planned to kill Tiffany McKinney for her car and dispose of the body (para. 12). Both Copeland and Forknall

independently led police to the burial site where police were able to recover the body (para. 6).

### Destruction of Evidence

As indicated in Figure 5, this stratagem proved to be effective in eight cases. Operatives quite simply propose to divert charges by either disposing of, or destroying, evidence. As previously mentioned, Michael Bradley Bridges became a target of an undercover operation designed to investigate the disappearance of his ex-girlfriend (*Bridges*, 2005, para. 16). Bridges would come to understand that Mr. Big, through his extensive connections, was made aware of a "problem" in Bridges' past, namely that he was the primary suspect in the murder of his ex-girlfriend. It was articulated to Bridges that the criminal organization could retrieve the body and dispose of the evidence (para. 19). Upon verification of the details by Mr. Big's sources, Mr. Big vowed to make "the problem" go away and secure Bridges' future role in the organization.

### Alibi Fabrication

When the target is "unable" to account for his or her whereabouts during the material time(s), undercover operatives suggest that the organization might be able to assist in fabricating an alibi to account for the discrepancy, provided the target's story checks out. As shown in Figure 1, the alibi fabrication ruse was employed in six cases. Exemplified in *Bicknell* (2003), an undercover police officer posing as the main contact for the criminal organization suggested that he could assist the accused by arranging for him to be seen on video at a local casino. The undercover officer would then retrieve the tape and alter the date and times to account for Bicknell's whereabouts during the time in question (para. 101).

In order to get Jason Joseph "on board" in terms of being part of the purported criminal organization, Mr. Big and one of his criminal counterparts suggested a scheme where an alibi would be created by having the suspect use false credit cards at a Montreal hotel bar (*Joseph*, 2000, paras. 44-5). Counsel for the accused argued that the alibi scheme concocted by undercover operatives (i.e., fabrication of evidence) was an obstruction of justice. However, Taylor J. concluded that the undercover officers never intended to provide Joseph with an alibi or to engage in a conspiracy to obstruct justice: "To do so would defeat the very object of the exercise: to obtain evidence of admissions upon which to prosecute the two accused for the offence of attempted murder" (para. 75). The holding out the possibility that an alibi would be provided was contingent on the accused providing officers with information about the crime so that the alibi could be created (para. 73).

### We Can Help You Beat It

While a polygraph examination is not admissible as evidence in court to show whether an accused is lying or telling the truth, it is used as an investigative tool by law enforcement agencies with increasing frequency (*Oickle*, 2000, para. 88). As such, Mr. Big's suggestion to targets that he will hire an "expert" to help the target beat a polygraph examination holds some weight with the target. This scheme was employed in two cases, but exemplified in *Fischer* (2005).

On the evening of 15 May 1999, the police were called to Lily Lake Road, 13 kilometres outside of Merritt, British Columbia, after a group of horseback riders from the lower mainland discovered the body of 16-year-old Darci Drefko. Patrick Fischer quickly came under suspicion, as he was the last person seen in the company of the deceased (*Fischer*, 2005, para. 3). He would soon become the target of a Mr. Big scenario. In a meeting with Mr. Big at the Sheraton Hotel in Guildford at Surrey, the boss stressed that

he was not willing to take risks with people he did not know. He then produced a fictitious police report, which implicated Fischer in the death of Darci Drefko (para. 14). The boss gave Fischer two options to make the investigation disappear: one, a DNA test, and the other, a polygraph test. Although Fischer was eager to secure a $20,000 payoff from a feigned drug deal, he was reluctant to participate in any tests fearing investigators would sabotage or manipulate the tests to implicate him in the murder (para. 34). Fischer and members of the local RCMP detachment had an abysmal relationship (paras. 5, 32).

Fischer did indicate that he would be prepared to partake in the test so long as Mr. Big could guarantee that he would pass because he did not trust the police (para. 14). This led to a considerable discussion about the possibility of the boss enlisting the help of an “expert” to help the accused defeat the lie detector test, which in turn, led to Fischer disclosing details about the murder:

> …okay here's what's going to happen, I'm going to get my guy, I'm going to get him up here, he comes out of the states, we'll get a hotel room and he's going to sit down and he's going to teach you how beat that fucking polygraph. It's simple, you're right, you are, you are 100 percent right when you say, it can be fucking beat, you're a smart guy that way. Okay, but he's going to want some background, so what Pat says in this room, stays in this room, okay, we don't have to tell Bert, I'm not going to tell Bert, and I'd prefer you just keep your mouth shut (para. 14).

Investigators, from the outset of the investigation, did not disclose the location of the body or the cause of death. Although Fischer maintained he was able to piece together details of the crime because of what others told him, in his confession to

undercover police officers, he disclosed information related to the cause of death and the location of the body.[55]

### Framing Someone Else

This scheme has undercover operatives suggesting that they can change the course of the investigation against the target by framing someone else. David Wytyshyn was the primary suspect in the murder investigation of his landlady's death. Knowing that he was the subject of this police investigation, an undercover officer belonging to a purported criminal organization recruiting Wytyshyn, offered to help frame another tenant for his landlady's murder (*Wytyshyn*, 2002, para. 4). In order to do this, however, Wytyshyn would have to disclose as much as possible about his involvement in the murder so as "to give credibility to the setup by ensuring that the information disclosed matched what had been discovered through police investigation" (para. 4).

## Recurring Legal Principles Raised by the Mr. Big Strategy

An analysis of the sixty-three legal decisions revealed several recurring evidentiary and procedural issues raised by this undercover tactic. The legal issues that were examined in this thesis include: 1) whether the target has a right to silence protected by section 7 of the *Canadian Charter of Rights and Freedoms*; 2) the applicability of the law on voluntariness of confessions and its persons in authority requirement; 3) whether the Mr. Big technique is tantamount to an abuse of process; 4) whether an admission from the accused is an exception to the hearsay rule requiring the establishment of necessity and reliability; 5) the admissibility of narrative evidence which

[55] Although not the precise location where the body was found, it was less than 100 yards from the site (*Fischer*, 2005, para. 20). Linda Fischer, Patrick's mother, alleges the holdback evidence was compromised and that her son's confession was contaminated by numerous sources. For more on the story see http://www.injusticebusters.com/06/Fischer,%20Patrick.shtml.

tends to show bad character or a criminal disposition; and 6) the ultimate reliability, prejudicial effects and probative value of Mr. Big confession evidence.

## Right to Silence as Protected by Section 7 of the Canadian Charter of Rights and Freedoms

Do the police, acting in an undercover capacity, have control over an individual's movements so as to deprive the suspect of their constitutional right to silence as protected by section 7 of the *Canadian Charter of Rights and Freedoms*? The Supreme Court of Canada, in *Hebert* (1990), examined whether a suspect's constitutional right to silence should be protected during the investigatory phase prior to detention or arrest.[56] Hebert conferred with counsel and subsequently asserted his right to silence only to have that right compromised by undercover police officers being placed in his cell. The majority decision, written by Madam Justice McLachlin, delineated the scope of the constitutional right to silence:

> The jurisprudence relating to the right to silence has never extended protection against police tricks to the pre-detention period. Nor does the Charter extend the right to counsel to pre-detention investigations. The two circumstances are quite different. In an undercover operation prior to detention, the individual from whom information is sought is not in the control of the state. There is no need to protect him from the greater power of the state. After detention, the situation is quite different, the state takes control and assumes the responsibility of ensuring that the detainee's rights are respected (para. 74).

Accordingly, it is only after a suspect is under detention that the use of undercover agents to subvert the suspect's right to remain silent would be prohibited (*Hebert*, 1990). Mr. Big undercover operations are conducted during the investigatory phase; targets are considered suspects and are not in detention at the material time they

[56] The rule relating to the right to remain silent can be traced to the common law confessions rule (*Hebert*, 1990, para. 47). McLachlin J., writing for the majority stated, "the right of the individual to choose whether to make a statement to the authorities or to remain silent, coupled with concern with the repute and integrity of the judicial process" (para. 47).

make statements to undercover police. Unless the target is aware of the true identity of the undercover officers, any statements made by the suspect during the undercover operation does not deprive the suspect of his or her constitutional right to silence and are admissible as evidence (*Creek*, 1998, para. 28).

To illustrate, Clifford Moore was suspected of being criminally involved in the death of Vaughn Davis, whose body was located just outside Valemount, B.C. (*Moore*, 1997, para. 1). Police suspicions intensified when investigating officers discovered Moore's palm prints at the crime scene. The decision to mount an undercover operation against him was made (para. 5). The elaborate crime boss ruse culminated in a meeting at the Jasper Park Lodge between the target and several undercover police officers (para. 6). The target voluntarily accompanied undercover operatives to Jasper Park Lodge, was checked into a hotel room and given $100 in cash (para. 17). The defence claimed that these circumstances were "tantamount to a detention" because of the degree of control exerted over Moore by undercover police officers (para. 15). In particular, counsel claimed that Moore "had no means of transportation independent of the undercover police" who transported him to the Jasper, Alberta (para. 15). In rejecting the appellant's argument, Madam Justice Proudfoot concluded that the atmosphere created by the undercover operation did not amount to detention because the appellant accompanied undercover officers to Jasper voluntarily. Furthermore, he could have used the $100 to purchase a bus ticket home. Therefore, the undercover officers did not breach the appellant's rights guaranteed under s. 7 of the *Charter*.

The New Brunswick Court of Appeal, in *McIntyre* (1993), dealt with the issue of whether statements made to an undercover police officer by a person released for want of evidence following his arrest unfairly deprived the accused of his constitutional right to silence (para. 47). Following his arrest, and after consulting legal counsel, Marven

McIntyre chose not to speak to authorities (para. 12). In order to obtain incriminating statements from him, the RCMP initiated a Mr. Big ruse by first placing a "cell plant" (undercover officer), posing as a criminal and ex-convict, in McIntyre's cell. "The plant" was introduced to McIntyre as a "Montreal criminal involved in the illegal cigarette trade, prostitution and other criminal activities" (para. 35). Once the undercover officer and McIntyre established contact, McIntyre was released for want of evidence (para. 47). As a result of being in the cell the undercover officer learned vital information about where the suspect lived, and subsequently made operational plans to run into him once he was released. Having gained the appellant's trust, undercover operatives offered him a job with the organization contingent on his ability kill. He subsequently made inculpatory statements about his involvement in the alleged murder (para. 37).

Mr. Justice Rice, dissenting in the New Brunswick Court of Appeal decision, found that the "cell plant" operation undertaken by police had its "beginnings during detention", and "successfully continued afterward" (para. 15). Citing McLachlin, J. in *Hebert* (1990), he concluded that the subterfuge exerted by police was compelling enough to undermine the appellant's constitutional right not to speak to the authorities (para. 17).[57] By admitting into evidence a statement obtained in this manner (conscripted) he said, "the Court could give the impression that it excuses or tolerates such deliberate conduct, the purpose of which is to exceed constitutional limits, or even that it condones such an attitude" (para. 21). Ayles, J.A., writing the majority decision, however, found that the appellant was not being detained for investigative purposes. Rather, "he was detained for a few hours and then released" (para. 54). What's more, there was no reason to protect McIntyre from the power of the state because he chose

[57] For the police to engage in trickery to extract a confession, subsequent to a suspect exercising his or her right to remain silent, "would effectively deprive the suspect of this choice" (*Hebert*, 1990, para. 66).

to become involved with the criminal organization, was free to come and go, and could have withdrawn from the organization at any time (para. 55). Thus, the actions taken by police did not violate the principles of fundamental justice, and this ground of appeal was subsequently dismissed (para. 56). On further appeal to the Supreme Court of Canada, Mr. Justice Gonthier, for the Court, agreed with the majority of the Court of Appeal, finding that the appellant "was not detained within the meaning of Hebert and Broyles", and also observed that the police trickery employed would not be so offensive as to shock the community (para. 1). The oral judgment was delivered without any detailed analysis; however, such an analysis may be warranted in the future.

## The Confessions Rule--Canadian Law on Voluntariness and the Person in Authority Requirement

As stated earlier, the confessions rule ensures that out-of-court statements made by an accused to a person in authority are admissible as evidence only if the statements are voluntary (*Hodgson*, 1998; *Oickle*, 2000). In 24 cases, defence counsel submitted that the accused's self-incriminating statements to undercover police officers should have been excluded since the admissions were a product of implied threats, psychological manipulation and significant inducements held out by persons in authority. In all 24 cases, however, the courts consistently ruled that from both a subjective and objectively reasonable standard the accused perceived the undercover officers to be criminal cohorts, and were unaware of the undercover officers' true identity. For example, Justice Marc Rosenberg, for the Ontario Court of Appeal in *Osmar* (2007) stated, "Although the statements are invariably induced by promises made by persons in authority" the issue of voluntariness, at common law, does not arise because the suspect is not aware of the true identity of undercover officers (para. 3).

The effect of the Supreme Court of Canada's decision in *Grandinetti* (2005) is that a confession coerced by undercover police officers who claim to be able to influence the course of an investigation through their corrupt police contacts are not persons in authority, thus falling outside the ambit of the confessions rule. Undercover police officers suggested to Grandinetti that they could use their corrupt police contacts to protect him from further police investigation. RCMP operatives shared a story with Grandinetti about what they were able to do for 'Dan', a member of the organization implicated in a murder. By using his connections to make a witness disappear and to retrieve vital, incriminating evidence, "Mac", the boss of the criminal syndicate, managed to have the murder charges reduced to aggravated assault (*Grandinetti*, 2005, para. 9). Grandinetti was unaware of the true identity of undercover officers (para. 15). The defence position at trial was that "Mac" and his criminal associates were, in effect, persons in authority because they proposed to enlist the help of corrupt police officers to influence the investigation against Grandinetti (para. 13). Madam Justice Abella, writing on behalf of the court held that "the state's coercive power is not engaged" when a suspect enlists the help of corrupt criminal justice officials to thwart the interests of the state (para. 44). In the end, the issue for the jury is whether the statement made by the accused is reliable and true (See *Carter*, 2001, para. 64).

Speaking for the majority in *Hodgson* (1998), Cory J. remarked that the common law confessions rule is calibrated to deter the use of improper coercive tactics by the state "and to preserve the principle against self-incrimination" (para. 29). The Court, however, observed that an out-of-court statement could sometimes be made in such coercive circumstances that the reliability of the admission is jeopardized even if it was not made to a person in authority (para. 26). Declining to eliminate the person in authority requirement, and urging Parliament to address the issue, Justice Cory stated:

> In the meantime I would suggest that in circumstances where a statement of the accused is obtained by a person who is not a person in authority by means of degrading treatment such as violence or threats of violence, a clear direction should be given to the jury as to the dangers of relying upon it. The direction might include words such as these: "A statement obtained as a result of inhuman or degrading treatment or the use of violence or threats of violence may not be the manifestation of the exercise of a free will to confess. Rather, it may result solely from the oppressive treatment or fear of such treatment. If it does, the statement may very well be either unreliable or untrue. Therefore if you conclude that the statement was obtained by such oppression very little if any weight should be attached to it" (para. 30).

This has become known as the "Hodgson warning". As Madam Justice Ryan observed in *Carter* (2001), the purpose of this warning "is to bring home to a jury that a confession obtained under oppressive or fearful circumstances may not be reliable and must be scrutinized with care. Self-preservation is a natural human instinct that may lead a person to confess to something he or she did not do simply to bring an end to the misery of the situation" (para. 59).

## Does the Mr. Big Operation Amount To An Abuse of Process?

At what point do the tactics employed by the police during the undercover operation become sufficiently egregious so as to shock the conscience of the community or cause the accused's statements not to be free and voluntary? In *Rothman* (1981), Lamer J. noted that the courts should be vigilant not to unduly limit police discretion:

> It must also be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community (697). [58]

[58] Examples of police trickery that may shock the community were set out in *Rothman* (1981), and later affirmed in *Oickle* (2000), and include "a police officer pretending to be a chaplain or a legal aid lawyer, or injecting truth serum into a diabetic under the pretense that it was insulin" (para. 66).

In 15 of the 63 cases, the defence challenged the admissibility of self-incriminating statements obtained during the undercover sting operation, arguing that the tactics "transgressed the bounds of acceptable" police conduct (*Terrico*, 2005, para. 3). As alluded to in the introduction, the verisimilitude of these undercover operations is impressive. To convey the impression that undercover officers are hardened and ruthless criminals, RCMP operatives utilize a range of tactics including violence, intimidation, psychological manipulation and implied threats of physical harm (i.e., feigned assaults/murders, threats of death or serious bodily harm).

In *Unger* (1993a), counsel for the accused submitted that the Mr. Big operation was "unfair in its implementation and design" and amounted to an abuse of process, which violated Unger's section 7 rights under the *Charter* (para. 55). Since Unger's confession stemmed from the "grand inducement" of membership in a criminal organization, counsel argued his statements should have been excluded from evidence (para. 56). The Manitoba Court of Appeal, however, affirmed the Manitoba Court of Queen's Bench holding that the evidence in question was admissible, and that the tactics employed by undercover operatives would not shock the conscience of the community. Scott C.J.M. went on to say that "Courts should not be setting public policy on the parameters of undercover operations" (para. 69). Moreover, it was the Court's view that, in light of the heinous circumstances surrounding the death of 16 year-old Brigitte Grenier, and given the lack of evidence, the public would endorse the efforts of the undercover police officers. The Manitoba Court of Appeal also held that undercover operatives did not subvert the accused's right to remain silent guaranteed by section 7 of the *Charter* because he was not detained or under arrest at the material time. The Court was of the view that Unger "was not coerced against his will or tricked into making a confession" (para. 78). This ground of appeal was subsequently dismissed.

In *United States of America v. Burns* (1997), an undercover operator testified that criminal organizations are “held together with violence and that the trust that is often associated with criminal organizations is based on a fear of reprisal for anyone who betrays the criminal organization” (para. 4). He conveyed to the accused that betraying the organization or a member thereof could lead to extreme violence against that person or that person’s family (para. 4). The undercover officer drew attention to an incident where Mr. Big arranged to have someone disposed of because he informed on the organization.

As Justice Romilly observed in *Riley* (2001), “Instilling fear in the accused is not necessarily coercion resulting in an abuse of process” (para. 24). Notwithstanding the fearful atmosphere that resonates throughout the undercover investigation, the director of undercover operations in British Columbia, Staff Sgt. Peter Marsh, stated that undercover operatives do not normally issue direct threats to targets, rather they are merely implied (Hutchinson, 2004 RB.1). A lawyer representing the RCMP asks, “Why would we want to create that kind of fear...Why would we want to put that on the table for a trier of fact to diminish our case” (Baron, 2008a, A.4). Furthermore, as Iacobucci J. observed in *Oickle* (2000) (although speaking about a confession to a person in authority), “any confession that is the product of outright violence is involuntary and unreliable…” (para. 53).

To convince David Lowe that the criminal organization he was dealing with had a known capacity for violence, officers staged a hostage-taking scenario of a woman. She was depicted as the girlfriend of a former member of the gang who owed Jason, the main undercover operator, a sum of money. Armed with a handgun, Jason acted violently toward the hostage and threatened to kill her and her boyfriend (*Lowe*, 2004, para. 249). On numerous occasions, other undercover operatives posing as Jason’s

associates would act frightened or highly respectful of him (para. 232). In a comparable scenario, Wilfred Hathway witnessed a feigned assault upon a female, who was covered in blood and then forcibly thrown into the trunk of a car. One of the undercover operatives threatened to kill her, her spouse, and their two-year old child (*Hathway*, para. 19).

During a feigned drug deal in *O.N.E.* (2000a), the accused witnessed an undercover operative become enraged with someone he suspected of being a “rat” (para. 33). Consequently, K.K., an undercover police officer posing as the main contact for the criminal organization, sent another operative to retrieve a “piece and muffler” (gun and silencer) (para. 34). O.N.E. was made to overhear this conversation. She also witnessed the purportedly vicious beating of the individual who informed on the organization (para. 35). K.K. testified that the scenario was intended to show the suspect that the criminal organization did not take kindly to persons who betrayed the organization, and that the organization would unhesitatingly resort to deadly force (para. 37).

In *Roberts* (1997), the defence position at trial and on appeal was that the Mr. Big investigation amounted to an abuse of process and a violation of the accused's s. 7 Charter rights. Hall J.A., writing for the Court, rejected the appellant’s submission stating that a reasonable, well-informed member of the community would “unhesitatingly endorse it” (para. 15). He chose the trenchant words of Scollin J. of the Manitoba Queen's Bench, in *Skinner* (1992), to express what he thought could be fairly said about the appellant as well as the police undercover activities:

> The difference between the unpalatable and the inedible is generally a matter of personal taste. Absent “dirty tricks”, the courts should not set themselves up as the arbiters of good taste or of the preferred methods of investigation. It is unrealistic to demand chivalry from those who must investigate what are often heinous offences against blameless victims.

> The law should not appear to materialize as a revolutionary rabbit from a judicial magician's hat. Both the common law and the Charter justly preserve the accused from coercion and endow him with specific rights which he may exercise at the time of his arrest and while he is in custody; but the courts should not be so indulgent as to preserve the accused from himself and his own untrammeled tongue, and should require realistic justification for suppressing facts from the jury which go to weight rather than to admissibility (275).

Operation Kabaya, a 13-month ruse aimed at procuring a confession from Jason Dix, is unquestionably one that not only embraces the spirit of violence, but also pushes the envelope of how far police were willing to go. In a scenario referred to as “Whack at Yaak”, the RCMP staged an elaborate drug deal gone horribly wrong. Dix and an undercover operative drove to a rural area outside of Yaak, British Columbia. Dix would remain in the vehicle as a lookout while the operative went into the dwelling to make the exchange (*Dix*, 2002, para. 126). Suddenly, Dix heard gunshots and witnessed the operative emerging from the dwelling wielding a sawed-off shotgun. The operative then faced the dwelling, fired two shots inside then ran to the vehicle. He ditched the firearm in the woods, got into the vehicle and explained to Dix that the victim tried to cheat the operative out of money and drugs (para. 127).

Dix was left with the impression that if he divulged this information to police he would be killed, and that several statements made by undercover operatives constituted clear threats (para. 130). Despite extreme pressure exuded by undercover operatives Jason Dix vehemently denied any involvement in the murders of the two victims (para. 131). Dix was awarded $765,000 in damages in 2002 after Justice Keith Ritter ruled that the “the police clearly did significantly and seriously cross that line”, and that the

undercover operation was so invasive that it was found to have breached his right privacy under ss. 7 and 8 of the Charter (*Dix*, 2002, para. 547).[59]

The case of Wesley Evans demonstrates how over-zealousness policing, poor training and outright negligence, in combination with psychological factors of the target, such as diminished cognitive functioning, put some individuals at increased risk to give false self-incriminating statements when subjected to the pressures of modern psychological interrogation techniques. This case is a "perfect storm" of sorts, where a combination of adverse factors led to the accused providing undercover operatives with unreliable, misleading, and erroneous statements, not to mention scenarios that led to a considerable discussion about the possibility of the organization killing two people for the target.

Concerning Wesley Evans' intellectual capacity and social functioning, Dr. Pos, a psychiatrist, and witness for the defence, testified at Evans' first trial that the accused had an I.Q. "roughly of between 70 and 80" and that he was "intellectually and emotionally immature and had a mental age of approximately 14" (*Evans*, 1988, para. 7). He also stated that Evans was "passive-aggressive and would be susceptible to suggestion by any questioner" (para. 7). At the Supreme Court of Canada, Madam Justice McLachlin found him to be an individual "of subnormal mental capacity" (*Evans*, 1991, para. 6). At his second trial, Dr. Robert Ley, a clinical psychologist, testified that Evans was highly suggestible, and would do or say anything in order to be accepted by his newfound friends (*Evans*, 1996, para. 24). Dr. Noone, a forensic psychiatrist, testified that Evans "sometimes used words calculated to impress without understanding them. His verbal ability was such that it was easy to overestimate his intelligence" (para. 23). His personality development had been affected by a head injury he sustained as a child

[59] It should be noted that this finding was in the context of a civil trial in which Jason Dix sued the Attorney General of Canada and numerous other people involved in the case.

and “by the traumatic effect of his prolonged hospitalizations” following third-degree burn injuries incurred at the age of eleven (para. 23).

That this case had a long and arduous history would be an understatement, and a synopsis is imperative in order to gain a full understanding of the circumstances that led to the decision to mount a Mr. Big undercover operation against the accused. To summarize, in 1988, at the age of 21, Wesley Evans was tried and convicted of the 1984 and 1985 murders of two British Columbia women. Initially, authorities believed Evans’ brother, Ronald, was responsible for the murders. As a result of a police wiretap, investigators suspected Wesley Evans was trafficking in marijuana (*Evans*, 1988, para. 3). As a result, detectives formed a plan to arrest Wesley Evans on a charge of trafficking in marijuana “in the hope that he would say something to implicate his brother in the murders” (para. 19). At the time of his arrest, investigators were informed of his diminished cognitive functioning and were told to ensure he was informed of his rights. When asked if he understood his constitutional rights, he replied, no. No further attempt was made by the two arresting officers “to explain the Charter or police warning to the appellant” (*Evans*, 1991, para. 13).

Following a series of three interviews in which investigators told Evans they found his fingerprints at one of the crime scenes, evidence which was false, Wesley Evans confessed to the murders. Significantly, the focus of the prosecution’s case was the confession evidence gathered over the course of the interviews, and a written statement from the accused, in which he confessed to both murders (*Evans*, 1988, para. 47). Dr. Pos testified that Evans’ confession was unreliable because his “answers followed a series of suggestive questions with Evans trying to please the investigators” (*Evans*, 1988, para. 60). Indeed, research has shown that persons with intellectual

deficits have a desire to please and are easily intimidated by persons in a position of authority (Drizin & Leo, 2004; Everington & Fullero, 1999; Gudjonsson, 2003b).

At trial, Mr. Justice Callaghan rejected defence counsel's arguments that the accused's confession was obtained in violation of ss. 10(a) and (b) of the Charter, and should have been excluded in accordance with s. 24(2) of the Charter because, in the circumstances, investigators acted in good faith (*Evans*, 1991, para. 25). A jury convicted the accused of two counts of first-degree murder.

Evans appealed to the British Columbia Court of Appeal, but to no avail. The majority dismissed the appeal on the grounds that the exclusion of the confession evidence would bring the administration of justice into disrepute. On further appeal to the Supreme Court of Canada, Madame Justice McLachlin concluded not only that Evans' admissions were "highly unreliable", but that "significant portions of the evidence which undermines the reliability of the statements was not before the jury" (para. 60). She went on to say that the statements made by the appellant "should never have been admitted" into evidence and, since they were obtained in violation of Evans' Charter rights, their admission would have brought the administration of justice into disrepute (*Evans*, 1991, para. 65). After Wesley Evans served approximately five years of his sentence the Supreme Court of Canada set aside his conviction and entered an acquittal.

After his release from prison, the RCMP set up a three-month program of surveillance on Evans, following a series of complaints about "bizarre behaviour on his part" (*Evans*, 1996, para. 4). Having failed to obtain sufficient incriminating evidence against him, the RCMP decided to conduct a Mr. Big sting. Preston J. observed that the operation was conducted "on the premise that Mr. Evans was guilty of the 1984-85 murders and that his acquittal "had something to do with the Charter." None of the police officers involved read the reasons for judgment of the Supreme Court of Canada"

(*Evans*, 1996, para. 4). Undercover operatives befriended their target and, given that Evans' I.Q. was between 70 and 80, investigators "established a great deal of mental ascendancy over him" (*Henry*, 2003, para. 42). Early on in the investigation, officers consulted with a psychologist for advice about how to conduct the undercover operation. They were advised "not make suggestions of a criminal nature to Evans because he 'would do anything to impress them'" (para. 9).

Officers intentionally disregarded the psychologist's advice and involved their target in a series of increasingly serious criminal exploits (para. 13). As Preston J. pointed out, "The climate created by the undercover operators was a climate of lawlessness and killing in which they did what they wanted to their great financial profit and were protected by the resources of the 'organization'" (para. 13). When operatives confronted Evans about the previous murders, he "resolutely resisted that pressure" (para. 13) until undercover police officers unexpectedly took him to a correctional facility to visit an undercover officer posing as an attempted murderer. During a conversation with that operative, Evans disclosed that he himself had spent time in prison for murders he did not commit. The undercover operator laughed at him and sneeringly remarked that he didn't do it either, but went on to say, "I shanked her" (para. 13). Evans then responded that he had, in fact, killed the two girls. When asked if he shot them, he replied, "No, I shanked them" (para. 13).[60]

Undercover officers maintained contact with their target and involved him in scenarios that ultimately led to considerable discussions about the possibility of Jake, an organizational member and hit man, killing two people for Evans (the target), an ex-girlfriend and the spouse of his current girlfriend (para. 15). Evans would eventually be charged with two counts of counselling murder.

[60] Both victims, Lavonne Cheryl Willems, and Beverly Seto, died as a result of multiple stab wounds (*Evans*, 1988, paras. 68-9).

Although chilling, the conversation related to the charge of counselling the murder of Evans' ex-girlfriend was not taken seriously as the undercover officers did not feel it was a serious threat (para. 28). As Preston J. noted, in order to constitute a criminal offence, threats of death or serious bodily harm "must have been meant to be taken seriously" (para. 27). Consequently, Preston J. acquitted Evans on the charge of counselling the murder of his ex-girlfriend. With respect to the charge of counselling the murder of Evans' girlfriend's spouse (David Williams), Justice Preston found that Evans was serious when he instructed "Jake" to kill Mr. Williams (para. 30), but that based on the defence of entrapment set out in *Mack* (1989), the police "employed means which went further than providing an opportunity for Evans to commit the offence of counselling the murder of David Williams" (para. 34). Given that Evans was the subject of police entrapment, the appropriate remedy was a stay of proceedings (para. 36). In closing, Mr. Justice Preston proclaimed, "I should say that I found it difficult to believe that these events took place in Canada…Undercover operations are very useful in police work. However, they do not allow the police to employ techniques that are antithetical to the principles of fairness embodied in the Charter" (para. 36).

## Is an Admission from the Accused Hearsay Governed by the Principled Exception to the Hearsay Rule?

Whether admissions are admissible under the traditional exception to the hearsay rule, or whether they are hearsay at all, is an area of law that is fraught with inconsistencies. In Canada, an out-of-court statement made by an accused person is, for the most part, admissible as evidence under the exception to the rule against hearsay (Brockman & Rose, 2006, 220).

In 1990, the Supreme Court of Canada developed a principled approach to determining the admissibility of hearsay statements, which requires the trial judge to

ascertain whether necessity and reliability have been established (*Khan*, 1990, para. 33; also see *Starr*, 2000, para. 153).[61] In *Hawkins* (1996), the Supreme Court of Canada explained the nature of the analysis, stating that it is the role of the trial judge to determine whether the hearsay statement meets the criteria of necessity and threshold reliability, "so as to afford the trier of fact a satisfactory basis" for evaluating the truthfulness of the statement, and the weight to be attached to it (para. 75). Nowlin (2004) posits that quid pro quo-based inducements held out to Mr. Big targets raise serious doubt about the reliability of these confessions, and this very factor provides "the circumstances of *untrustworthiness* that should lead to the statement's exclusion according to Starr" (397).

In 10 of 63 decisions, counsel for the accused challenged the admissibility of statements made to undercover operators on the basis that the statements were hearsay requiring the application of necessity and reliability analysis of the principled exception to the hearsay rule. In *MacMillan* (2003), the question of whether the accused's statements were hearsay requiring the application of the necessity and reliability analysis was fully argued and was "the subject of a careful and comprehensive decision" (*Perovic*, 2004a, para. 18). McEwan J. relied on the Supreme Court of Canada's decision in *Evans* (1993) and the subsequent decision of the Ontario Court of Appeal in *Foreman* (2002)[62] to conclude that inculpatory statements made by the

[61] The principled exception to the hearsay rule was established in the landmark decision of *Khan* (1990). The issue in that case was whether the statements made by a three and a half year old girl to her mother 15 minutes after an alleged sexual assault were admissible as evidence under the principled exception to the hearsay rule. McLachlin J., writing for a unanimous Court, held that since the child was not competent to give unsworn testimony, the mother's statement was necessary. On the question of reliability, she said, "The child had no motive to falsify her story, which emerged naturally and without prompting. Moreover, the fact that she could not be expected to have knowledge of such sexual acts imbues her statement with its own peculiar stamp of reliability. Finally, her statement was corroborated by real evidence" (para. 34).

[62] In *Foreman* (2002), Doherty J.A. stated, "Admissions, which in the broad sense refer to any statement made by a litigant and tendered as evidence at trial by the opposing party, are admitted without any necessity/reliability analysis" (para. 37).

accused were admissible as evidence based on an exception to the exclusionary rule. He stated:

> The generalizations in Starr which rationalize the traditional exceptions to the hearsay rule within the "principled" approach do not, in my view, override the clear language in Evans identifying the rationale for treating admissions by a party differently from other exceptions to the rule (para. 32).

That same line of authority persuaded trial judges in *Perovic* (2004b), *Lowe* (2004), *Ciancio* (2007), and *Osmar* (2007), and the British Columbia Appellate Court in *Terrico* (2005) to conclude that the *Starr* analysis was not required, and the statements were subsequently ruled admissible under the traditional exception to the hearsay rule. In his ruling, in *Perovic* (2004a), Williams J. stated that if he erred in his decision, the statements, in any event, met the threshold reliability and would have been admitted (paras. 21-23).

While the courts have consistently ruled in favour of the traditional exception to the hearsay rule (without the requirement of necessity and reliability), there were two occasions where the courts applied the principled approach to hearsay evidence to an admission of the accused obtained in the course of a Mr. Big undercover operation.

In *Wytyshyn* (2002), counsel for the accused conceded that his confession was theoretically admissible under the common law exception to the hearsay exclusionary rule, but argued that the trial judge, based on the decision in *Starr*, was still required to consider whether statements met the required degree of threshold reliability (para. 6). The Alberta Court of Appeal agreed, and applied the principled approach to hearsay evidence to the confession but concluded:

> "Wytyshyn made these inculpatory statements knowing that it was important that the information he disclosed be accurate and consistent with the results of the police investigation. In other words, from

> Wytyshyn's perspective, he had a motive to tell the truth, that is a reason to talk about what happened but not to lie about it" (para. 8).

The Alberta Court of Appeal dismissed this ground of appeal.

In *Bridges* (2005), Menzies J. also gave careful consideration to the stated law surrounding whether admissions are admissible under the traditional exception to the hearsay rule, or whether they require a necessity and reliability analysis. He elected to follow the latter, stating:

> The principled approach creates a new standard for the consideration of admissibility of hearsay evidence. Iacobucci's comments leave little doubt the Supreme Court intended for the principled approach to apply to all categories of hearsay evidence. Evidence that may have been admissible under the common law rules of hearsay evidence may no longer be admissible under the principled approach. Conversely, evidence that was not admissible under the common law rules of hearsay evidence may now be admissible (Bridges, para. 8).

After applying the principled reliability/necessity test to Bridges' statements, Menzies J. found the statements met the requisite threshold reliability and admitted them into evidence.

Finally, the issue of whether the principled approach to hearsay evidence need be applied to an accused's statements was addressed by the British Columbia Court of Appeal's decision in *Terrico* (2005). The trial judge accepted Crown counsel's concession that statements made by the accused to undercover officers required the application of the principled approach to the admission of such hearsay evidence (para. 14). He then found that the confession provided a necessary circumstantial guarantee of trustworthiness to be admissible as evidence. On appeal, Newbury J.A. (in her dissenting judgment) found that the trial judge had not erred in applying the *Starr* analysis to find a requisite level of reliability (para. 26). Huddart J.A., for the majority on the issue, however, would have admitted the confession "without a necessity/reliability

analysis as an admission against interest" under the traditional exception to the hearsay rule (para. 49). As one final note, Madam Justice Levine, in the recent decision of *Bonisteel* (2008), adopted the rationale of the majority of her colleagues in *Terrico* (2005).

As evidenced above, judicial practices concerning the appropriate procedure for determining the admissibility of admissions made during post-offence undercover operations vary across Canada (Nowlin, 2004, 398). Whether an admission is admissible under the traditional exception to the exclusionary rule or whether it merits the application of the principled approach to hearsay evidence is still an issue that has yet to be resolved by the Supreme Court of Canada. Newbury J.A., in *Terrico* (2005) stated that this issue is one in "which the guidance of the highest court in Canada would be useful" (para. 22).

### Narrative Evidence That Tends To Show Bad Character Or A Criminal Disposition

In 17 cases, counsel for the accused challenged the trial judge's decision to admit the accused's confession in evidence, citing that evidence of the accused's bad character was "inextricably bound up" with the confession to undercover police officers. Counsel moved to exclude evidence of discreditable conduct on the grounds that it was highly prejudicial and otherwise irrelevant to the prosecution's case beyond a general disposition. Admission of such evidence raised concerns that the jury, when assessing the accused's testimonial trustworthiness, would give it more weight than was warranted (See *Caster*, 1998; *G. (S.G.)*, 1997; *Redd*, 2002). In all but one the case, the trial judge ruled the statements admissible as evidence.

Subsequent to a *voir dire* held to determine the admissibility of Wesley Creek's post-undercover operation narrative, Justice Stewart agreed with the submission of

counsel for the accused that the prejudicial effects of Creek's statements to police, taken as a whole, far outweighed the potential probative value. He favoured the exclusion of the evidence over a limiting instruction to the jury because he believed a "prophylactic warning" would not counterbalance the prejudice of extrinsic misconduct (*Creek*, 1998, para. 36). Moreover, Creek did not disclose information that the police held back from the public and other independent, reliable evidence did not corroborate his statements. In the end, the statement was "not of great probative value" (*Creek*, 1998, para. 33).

Although Justice Stewart's line of reasoning for excluding Creek's undercover operation narrative makes intuitive sense, his decision seems to be a legal anomaly. Yet as Nowlin (2004) points out, the circumstances of the Mr. Big undercover operation initiated against Wesley Creek are "not readily distinguishable" from other cases (383). Indeed, the same can be said about the undercover operations within this sample of cases. As a matter of policy, Nowlin (2004) recommends that "in the absence of cogent, corroborative, real or circumstantial evidence" that enhances the reliability of confessions made to Mr. Big, a general exclusionary rule should prevail (401).

Indeed, the social and economic incentives offered to targets (i.e., the promise of wealth and membership into a powerful criminal organization) can encourage "false bravado and boastfulness" (*Perovic*, 2004b, para. 25) of not only an accused person's participation in the crime under investigation, but also of prior misconduct and criminal proclivity (Nowlin, 2004, 395). According to Nowlin (2004),

> These cases speak more loudly about the willingness of some people to fabricate criminal histories about themselves for the sake of belonging to a powerful social group and acquiring real wealth illicitly than to the volumes of psychological studies and reported cases about false confessions elicited through police interrogation (394).

The very fact that the target is seeking membership in what he or she believes to be a criminal organization speaks of the target's character in a negative way (*Raza*,

1998, para. 81). As Stewart J. observed in *Creek* (1998), "The dynamics set in motion by the undercover officers who presented themselves to the accused as hard core, successful and violent criminals was based on a perverted moral compass. That is to say, the worse the accused said of himself and his deeds, the better his future with the bad guys' criminal organization would be" (*Creek*, 1998, para. 24). From a target's perspective, he or she has to demonstrate that they too are hardened criminals that can be trusted and are capable of "carrying out the kind of criminal acts required by the organization", even if it means falsifying or even concocting ostentatious stories of past criminal conduct (*Osmar*, 2007, para. 1).

As a general rule, evidence of an accused's unrelated past activity is subject to a general exclusionary rule because it has been shown to have a highly prejudicial effect on juries, and there is "considerable danger that it will be used illogically or given too much weight" (Sopinka et al., 1999, 472; also see Brockman & Rose, 2006, 283).[63] Although highly prejudicial and otherwise irrelevant to the prosecution's case (not to mention contrary to jurisprudence relating to this area of the law), Canadian courts now admit evidence of an accused's bad character obtained as a result of a Mr. Big scenario. McFadyen J.A., for the majority in *Grandinetti* (2003) explained the rationale for this: it is "relevant to understanding the investigation and the context within which the conversations with the undercover police officers occurred" (para. 66) (also see Nowlin, 2004, 381). A suspect's confession to undercover police officers is "inextricably interwoven" (*Bonisteel*, 2008, para. 29) within the context of discussions relating to other

[63] Sections 666 and 360 of the *Criminal Code* also provide exceptions to the general rule. Also see Sopinka et al., 1999, 493; *B. (F.F.)*,1993, para. 72; *G. (S.G.)*, 1997, para. 63; B. (C.R.), 1990, at 744.

criminal activities, be it prior misconduct and/or a willingness to engage in ongoing or future criminality (*Caster*, 1998, para. 6).[64]

**Editing the Statements to Remove Prejudicial References?**

As the Supreme Court of Canada observed in *Beatty v. the King* (1944), it is acceptable for the trial judge to edit the statements of an accused, removing irrelevant facts, if it can be done "without in any way affecting the tenor of it" (para. 3). Editing the undercover operation narrative to remove references to bad character, according to Nowlin (2004), is a "catch-22" and would be detrimental to an accused's case because the discussions relating to other criminal activities are necessary to demonstrate that the so-called confession "is both incredible and unreliable", and that the confession was concocted to secure significant financial payments and membership to the fictitious criminal organization (402). In essence, Nowlin (2004) argues that the highly prejudicial and otherwise irrelevant evidence of bad character is requisite to the accused's defence (406).

Absent unusual circumstances, the Canadian judiciary has steered clear of editing the accused's statements to undercover police officers because they ostensibly provide "some apparently relevant "narrative" or synonymous notion such as 'context'" (Nowlin, 2004, 412). Parrett J., in *Cretney* (1999), cautioned that abridged statements might result in a "form of manufactured circumstances substantially altered from reality" (para. 32). He went on to say that although evidence of the accused's discreditable conduct incidentally demonstrates bad character, his statements to undercover police officers were both relevant and necessary to the truthfulness of the accused's

[64] Belief perseverance (also referred to as the primacy effect and belief persistence) is a theory which postulates that once a belief is formed early on, it is resistive to change, even in the face of compelling, contradictory or discrediting evidence acquired thereafter (Anderson, Lepper, & Ross, 1980; Burke, 2006; Kassin, 2005; Nickerson, 1998).

confession, “and essential to a fair unfolding of the narrative and to enable the jury to have a full and proper understanding of the circumstances in which the statements were made” (*Cretney*, 1999, para. 33).

The appellate courts have delivered judgment in eight cases concerning a limiting instruction to the jury about the use of character evidence. The thrust of the argument raised on appeal was that the trial judge erred in failing to either exclude evidence of discreditable conduct in its entirety, or by not removing references from an accused’s statement that demonstrated nothing more than a mere criminal propensity, and by failing to sufficiently instruct the jury about drawing adverse inferences against the appellant because of his or her participation in the criminal enterprise. In her instructions to the jury concerning the improper use of this evidence, the trial judge in *Grandinetti* (1999) stated:

> You must not, and I stress the word must not infer from this evidence of character and disposition alone that Cory Grandinetti was a person likely to have committed the offence of murder. In other words, you cannot use this evidence or consider this evidence for the purpose of proving that the accused is a person who by reason of his criminal character or propensity is likely to have committed the crime charged (*Grandinetti*, 2003, para. 72).

McFadyen J.A., for the majority of the British Columbia Court of Appeal, found both the limiting instructions and the timing of those instructions given by the learned trial judge sufficiently addressed the issue that the jury would have drawn improper inferences about the accused. Also, she was confident that the members of the jury

were sufficiently competent and intelligent to comprehend the trial judge's warning (para. 73).[65]

Vincent Redd argued unsuccessfully that his involvement in what he believed to be criminal conduct, as well as admissions to undercover operatives regarding previous criminal conduct, were not relevant to any issue in his case and ought to have been excluded (*Redd*, 2002, para. 35). In his post-offence undercover narrative he claimed responsibility not only for the murder of Keitha Llewellyn, the victim of the homicide charge before the court, he admitted to the shooting of Gerard Hurley in Chiliwack, BC, and said he was responsible for four other homicides in Alberta, which police investigated and determined to be conjured up (para. 159; also see, Nowlin, 2004, 403). The trial judge, Madam Justice Saunders, ruled that the probative value of this evidence outweighed its prejudicial effect and that Redd's statements had "sufficient imprimatur of reliability to go to the jury" (para. 172). In her limiting instruction to the jury on the use of this evidence, she stated, "The reason this evidence was allowed was as part of the narrative and to provide a full picture for you, including not just of Mr. Redd, but also of the two undercover officers as that may relate to your assessment of credibility" (*Redd*, 2002, para. 41). She went on to say that jurors "should disregard any evidence relating to the character or disposition of Mr. Redd that showed he was involved in immoral, or illegal activities and, most specifically, you must not infer from this evidence of character or disposition that Mr. Redd was a person likely to have committed the killing of Keitha Llewellyn" (*Redd*, 2002, para. 41).

[65] Despite the judiciary's confidence in jurors' ability to understand legal instructions, the results of an overwhelming number of social scientific studies coalesce around the conclusion that jurors have difficulty comprehending and following legal instructions (Cutler & Hughes, 2001; Jackson, 1992; Jones & Myers, 1979; Reifman, Gusick & Ellsworth, 1992; Rose & Ogloff, 2001; Saxton, 1998; Severance & Loftus, 1982, 1984; Severance, Greene, & Loftus, 1984; Young, Cameron & Tinsley, 2001).

In *Bonisteel* (2008), the appellant submitted that, in addition to other prejudicial matters, the trial judge erred by not removing references to Bonisteel's previous rape convictions, which were irrelevant and highly prejudicial (para. 28). It was argued that the "extreme prejudice posed by the evidence could not be ameliorated by jury instructions" (para. 28). The trial judge concluded that the prejudicial portions of Bonisteel's statements were inextricably interwoven with, and relevant to, the truthfulness of the confession (para. 48). The majority decision of the British Columbia Court of Appeal, written by Levine J.A., found that the trial judge did not err in his limiting instructions to the jury, nor was he required to edit the accused's statements, subsequently dismissing this ground of appeal.

The rationale for allowing out-of-court statements to be admitted as evidence is based on the assumption that a "prophylactic warning to the jury" (*Creek*, 1998, para. 36) on the prohibited use of this type of evidence will prevent the jury from drawing any adverse inferences against the accused ((*B. (F.F.)*, 1993, para. 80; *G. (S.G.)*, 1997, para. 72), despite little, or no empirical evidence to support it. In *W. (D.)* (1991), Cory J., for the majority, was confident that jurors are able to understand and follow the trial judge's instructions saying, "Today's jurors are intelligent and conscientious, anxious to perform their duties as jurors in the best possible manner. They are not likely to be forgetful of instructions" (761).

On the contrary, Dufraimont (2008) recently proposed that miscarriages of justice resulting from unreliable evidence were most acute in jury trials. As a result of an unfamiliarity with the criminal justice system and inexperience in criminal law, lay jurors do not normally possess the requisite knowledge or skills to properly evaluate evidence tendered at trial, and "can be led astray by common sense beliefs that are misguided" (para. 3). While the Supreme Court of Canada has advanced a general exclusionary rule

to address the issues associated with character evidence, there appears to be ambiguity or inadequacy in the governance of the rule in cases of Mr. Big.

Concern about jurors' overvaluation of character evidence is supported by early jury simulation research, which has shown that disclosure of a suspect's prior criminal record causes jurors to form an unfavourable opinion of the accused, which inexorably influences their decision of guilt or innocence. In fact, jurors who possess information about the accused's prior criminal record are more likely to convict than jurors who have no information, and the judge's limiting instructions on the use of criminal record evidence has been shown to have little effect on jurors' when determining guilt or innocence (Doob & Kirshenbaum, 1972; Hans & Doob 1976; Sealy & Cornish, 1973). More recent simulation experiments have corroborated previous findings that limiting instructions on the use of criminal record evidence are ineffective in preventing jurors from using that evidence when determining guilt or innocence (Greene & Dodge, 1995; Rose, 2003; Wissler, Kuehn, & Saks, 2000).

A number of studies have been conducted in which people who had previously served on juries in criminal trials were asked whether the trial judge's instructions were helpful to them (Cutler & Hughes, 2001; Jackson, 1992; Reifman, Gusick & Ellsworth, 1992; Saxton, 1998; Young, Cameron & Tinsley, 2001). The preponderance of jurors in all studies asserted a high level of comprehension, finding that the trial judge's instructions were clear, easy to understand and helpful to them in their task. Despite jurors' confidence in having understood the trial judge's instructions, "their confidence is not a good measure of actual understanding, which was found to be significantly lower than the participants had believed" (Ogloff & Rose, 2005, 412). Juror comprehension studies within the context of a simulated trial (i.e., mock jury paradigm) have also confirmed the supposition that jurors not only have difficulty comprehending and

following judicial instructions, they also have a limited understanding of the law (Jones & Myers, 1979; Rose & Ogloff, 2001; Severance & Loftus, 1984).

According to legal commentators, one of the reasons jurors have difficulty comprehending judicial instruction is because instructions are comprised of complex, technical legal language. According to Dufraimont (2008), "One can hardly be surprised that jurors have trouble grasping complex and esoteric legal rules or concepts when they are explained briefly, orally and in impenetrable language" (para. 64). It is no surprise, then, that a proposed solution to the problem is to redraft legal instructions, paying heed to "syntax, grammar, vocabulary and resister, increased redundancy, and the elimination of known impediments to comprehension" (Ogloff & Rose, 2005, 427; also see Goodman & Greene, 1989).[66] However, since jurors have been shown to possess their own commonsense notions of the law, Morier, Bordiga and Park (1996) propose, "comprehension of the law and legal rules will be maximized when the legal instructions require an understanding that is compatible (rather than at odds) with intuitive reasoning" (1859). It is Smith's (1991) contention that simply rewriting instructions to remove technical, legal language does little to solve the problem of poor juror comprehension (869) (also see Otto, Applegate, & Davis, 2007; Smith, 1993). According Ogloff and Rose (2005), perhaps more useful would be to provide the jury with instructions about the law prior to hearing evidence, a legal framework so to speak, so that jurors are apprised of the types of "questions they should consider before they evaluate the evidence presented at trial" (439).

[66] A number of studies have examined the effect of revising and rephrasing of legal instructions, and have found, generally, improved comprehensibility but still comparatively low levels of understanding (Frank & Applegate, 1998; Halverson, Hallahan, Hart & Rosenthal, 1997; Goodman & Greene, 1989; Jones & Myers, 1979; Masson & Waldron, 1994; Wiener, Pritchard & Weston, 1995).

It is not yet clear whether juror simulation studies are an appropriate means of informing legal and public policy decision-making. Critics of jury simulation research contend that such experiments suffer methodologically, particularly the ecological validity and generalizability of the findings (Bornstein, 1999, 88-9; Breau & Brook, 2007, 87-90; Redlich & Goodman, 2003, 154).[67] Laboratory settings do not approximate the real-life situation of the courtroom; they are artificial and often employ unrealistically straightforward stimulus materials and measures (Ogloff & Rose, 2005, 425; Rose & Ogloff, 2001, 410). The very fact that jurors know they are participating in an experiment prevents them from fully appreciating the very real consequences that accompany their decision to convict or acquit. Another methodological criticism is the use of undergraduate students as participants. They are ostensibly thought to have "greater average intellect than real jurors" (Rose & Ogloff, 2001, 424). Notwithstanding the fact that the aforementioned criticisms make intuitive sense, Ogloff and Rose's (2005) extensive perusal of the extant literature on the comprehension of judicial instructions has shown that various methodologies, in a variety of contexts, "have been remarkably consistent in showing" that legal instructions, instructions to disregard evidence, and limiting instructions to jurors, are ineffective and misunderstood (426).

In addition, since section 649 of the *Criminal Code* prohibits jurors from disclosing information related to the proceedings, particularly what went on during jury deliberations, the experimental value of simulated jury research is essential in order to further understand the jury decision-making process (Rose & Ogloff, 2001, p. 410). Despite recommendations from the Law Reform Commission of Canada (1980), that research findings could play an important role in law reform, as well as providing criminal justice officials with an appraisal of the present system, section 649 continues to

[67] For more on methodological characteristics typical of existing jury simulation studies see Diamond, 1997; Weiten & Diamond, 1979.

proscribe jurors from participating in social science research (143) (see Brockman & Rose, 2006, 111).

### Ultimate Reliability, Prejudicial Effects and Probative Value

As previously alluded to, the police claim that this interrogative technique is used as a last resort effort to procure vital evidence in the form of a confession in a criminal investigation. Often times, the accused's confession is the only substantive piece of evidence linking the accused to the crime. That a confession was vital evidence in the prosecution of 27 of these cases is quite disconcerting given that social science research suggests that confession evidence has a significant biasing effect on perceptions and decision-making process of jurors, and that an admission of guilt alone can conceivably ensure a guilty verdict (Conti, 1999; Driver, 1968; Drizin & Leo, 2004; Kassin & Sukel, 1997; Kassin & Neumann, 1997; Kassin & Wrightsman, 1980, 1981; Leo & Ofshe, 1998a; Wrightsman, Nietzel & Fortune, 1994). Nowlin's (2004) analysis of the Mr. Big post-offence undercover operation prompted him to ask why these apparent confessions are "presumed to have some air of reliability, sufficient to be put to the jury, instead of being presumed to be unreliable, at least without more" (Nowlin, 2004, 395)? Within the current Canadian criminal justice framework, there are no legal safeguards or mechanisms in place to regularly challenge the reliability of a suspect's out-of-court statement in a Mr. Big operation.

Therefore, it is vital that a potentially fabricated confession be independently verified, through some sort of corroboration. At common law, corroboration is defined as "confirmation from some other source that the suspect witness is telling the truth in some part of his story which goes to show that the accused committed the offence with which he is charged" (*Vetrovec*, 1982, 829). Corroboration does not necessarily have to be inculpatory; it "requires only that the evidence confirm the witness's story in some

material particular" (*R. v. B. (G.)*, 1990, 4). In 22 of the 63 cases, the judge made reference to the fact that the accuseds' confessions were corroborated in some material particular. This finding does not necessarily suggest that there was no corroborating, or other independent evidence confirming the details of the accused persons' confession in other cases.

In his reasons for judgment, Williams J. in *Perovic* (2004b), acknowledged that the "carefully structured relationships provide substantial inducements to targets to make confessions to crimes and that they create very real concerns that false confessions may be offered" (para. 26). In addition, confessions are often the product of psychological manipulation and implied threats of physical harm, which unquestionably undermine the reliability of a confessional statement. Justice Williams therefore explained the significance in finding confirmation of the details of the confession in other independent evidence, saying:

> I recognize that such undercover operations tend to encourage false bravado and boastfulness in the targets. There is a real concern that the targets will exaggerate their role in any activity. I am aware that the statements thus made are not contrary to the penal interest of the subject but, rather, occur in an atmosphere where there is a pressure upon the subject to claim credit for criminal activity. I recognize that the undercover operators often make generous payments to targets for their performance of apparent criminal activities, that they hold out a powerful inducement of membership in a sophisticated and wealthy organization, and that the target engages in dealings with individuals who are made to appear powerful and capable of great violence (*Perovic*, 2004b, para. 25).

Should the trial judge, in his or her charge to the jury, be required to instruct the jury specifically as to the unreliability of an accused's admissions to undercover police officers, "in accordance with obiter dicta in R. v. Hodgson [1998] 2 S.C.R. 449" (*Terrico*, 2005, para. 3)? The British Columbia Court of Appeal has delivered judgment in seven cases, and the Ontario Court of Appeal in one case, related specifically to this issue. In all eight cases, the appellate courts upheld the trial judge's decision not to give the jury a

specific direction concerning the inherent unreliability of the accuseds' statements to undercover police.[68]

Despite assertions from Brian Carter that he was "extremely frightened at the time he made the statement" and that the interrogation tactics employed by the undercover officers created "an atmosphere calculated to strike fear and to completely overrun any resistance or choice that a person may want to exercise" (*Carter*, 2001, para. 27), Ryan J.A. concluded that a "Hodgson warning" about the reliability of the appellant's confession to the undercover police officers was not necessary. Mirroring this sentiment, Madam Justice McFadyen, for the majority in *Grandinetti* (2003), ruled that there was no air of reality to an allegation that the appellants' statements were made in oppressive or threatening circumstances, thus a specific warning from the trial judge was not necessary (*Grandinetti*, 2003, para. 27). Most recently, in *Osmar* (2007), Mr. Justice Marc Rosenberg affirmed the order of the Ontario Superior Court of Justice that a "Hodgson warning" would have been of no assistance to the appellant. While there were inducements offered to Osmar, Rosenberg J. observed, "his treatment by the undercover officers that led to the confession could not be properly characterized as degrading and did not include the use of violence or threats of violence" (para. 76).

The Appellate courts have made it clear that statements made during the course of a Mr. Big undercover sting operation should be viewed as inherently unreliable and should be scrutinized with extreme care and hold little or no probative value unless confirmed by other independent evidence (*Bonisteel*, 2008; *Forknall*, 2003; *G.W.F.*, 2003; *McCreery*, 1998; *Skiffington*, 2004; *Terrico*, 2005). But a review of these authorities suggests that there is no "specific formulation of a warning that must be

[68] British Columbia Court of Appeal decisions: *Bonisteel* (2008); *Fischer* (2005); *Forknall* (2003); *French* (1997); *McCreery* (1998); *Skiffington* (2004); *Terrico* (2005); Ontario Court of Appeal decision: *Osmar* (2007).

given" as it relates to the reliability of the statements made by the accused to undercover police officers (See *McCreery*, 1998, para. 26; *Bonisteel*, 2008, para. 73).

Gudjonsson (2003b) theorizes that admitting confessions obtained by virtue of a Mr. Big scenario into evidence, and letting a jury determine their probative value, is worrying "because the risk of such confessions being false is considerable if an innocent person is coerced in this way" (582). In fact, he contends that the possibility of eliciting a false confession could be even greater in this non-custodial context. Juxtaposed with custodial interrogation settings, targets of the Mr. Big scenarios do not perceive the potentially devastating consequences of confessing to a crime. They might offer up unreliable, misleading, or erroneous statements

> merely as a way of compromising between agreeing to something they did not do (i.e. telling lies about the involvement in the offence) and fear of the consequences if they do not confess (i.e. perceived certainty of a conviction, upsetting the members of the organization with whom they have developed a relationship and being rejected by the criminal organization) (582).

Correspondingly, Dr. Richard Ofshe, a social psychologist and a leading expert on the phenomenon of false confessions, opines that the Mr. Big undercover operation is "a potentially dangerous one because there is no downside to making the claim of involvement in criminality" (*Osmar*, 2007, para. 60). In *Osmar* (2007), Ofshe testified that in this type of undercover investigation, "the possibility of being punished for confessing falls to zero since the suspect perceives the situation as one in which the state is not involved" (para. 60).

In *Mentuck* (2000b), MacInnes J. cautioned the police to "be aware that as the level of inducement increases, the risk of receiving a confession to an offence which one did not commit increases, and the reliability of the confession diminishes correspondingly" (para. 100). In *Ciancio* (2006), Madam Justice Boyd was of the view

that “an overly generous offer may induce the target to make untruthful statements in order to be part of the organization” (para. 273).

Dr. Shabehram Lohrasbe, an expert forensic psychologist with special expertise in the area of false confessions, testified in *C.K.R.S.* (2005) that a suspect’s economic status could increase the likelihood of a suspect giving erroneous information to police, and could therefore, play a role in the elicitation of a false confession (para. 93, 95).[69] This particular assertion may seriously undermine the reliability of these supposed admissions given that many of the targets of Mr. Big scenarios are marginalized persons “on the fringes” of society (Baron, 2008a, A.4).[70] Thus, the question then becomes how to delicately balance an opportunity structure so as not compromise the reliability of the statements or even worse, elicit a false confession or admission (Nowlin, 2004, 394).

**Money as a Significant Inducement**

In many of the scenarios, targets are involved in what appear to be a series of criminal activities. Upon completion of these purported illegal tasks, targets are paid small sums of cash for their efforts (small in the sense that it does not compare to the money they could earn once they have demonstrated themselves as loyal, honest, and trustworthy). To convey to targets the potential criminal lifestyle they could be leading, undercover operatives subsidize transportation costs, meals, clothing and hotel accommodations, and in some cases, cellular phones. Some of the scenarios might feature “business-class air travel, fancy cars, and high-end hotel rooms” (Baron, 2008a,

[69] Dr. Lorhasbe did not give evidence as to whether the accused confessed falsely, but “was called to testify only as to the nature of a false confession, and to confirm that they do exist” (*C.K.R.S.*, 2005, para. 89).

[70] See Anderson & Anderson’s (1998) discussion on how the marginalized and underprivileged, those who live on the fringes of society, are overrepresented in the criminal justice system (17-20).

A.4). And, depending on the target's lifestyle choices, they might be treated to more mundane activities such as exotic dancers (Baron, 2008a, A.4).

In 17 cases, there was evidence that the suspect's financial circumstances were such that the economic incentives offered by the criminal organization were difficult to pass up. Illustrated in *Evans* (1996), Mr. Justice Preston described the accused's circumstances as such:

> He had barely enough money to survive at a subsistence level. The undercover operators bought him liquor, gave him money to buy drugs and shoes and bought him food. They held out to him the hope of becoming part of their organization and obtaining a secure friendship with them and their associates. They were confident, well dressed and financially comfortable. They were everything that he was not. He had no other friends (para. 14).

Clayton George Mentuck, over the course of seven days, earned $1,800 for a series of jobs he performed for the primary undercover operator. The work was minimal in nature and took the accused roughly 20 hours to complete (*Mentuck*, 2000b, para. 76). In fact, one police witness testified the remuneration "may have been more money than he'd seen in his life" (*Mentuck*, 2000b, para. 99).

Wayne MacMillan's assistance to an undercover operator earned him nearly $2,000 over a three-week period (*MacMillan*, 2003, para 19). During an elaborate eight-month operational plan against C.K.R.S., the accused performed over 40 jobs for the organization, and was compensated over $6,700 plus expenses for his efforts (para. 37-8).[71] For one year, undercover operatives involved G.W.F. in a series of criminal activities, including contraband deliveries, money laundering, and counting large sums of money received from a feigned cocaine smuggling enterprise. He was compensated a total of $5310 for his help (*G.W.F.*, 2000, para. 52).

[71] Since each scenario required a significant amount of travel, officers financed his trips, paying for accommodations, air travel, or transportation by bus. In addition, he was given two cellular phones so that he could remain in contact with gang members (para. 37).

In 2002, Nelson Hart, a truck driver from Gander, Newfoundland, became the target of a Mr. Big undercover operation designed to elicit incriminating statements from him regarding his involvement in the drowning of his two daughters. Playing on the fact that he was a truck driver, members of the criminal organization offered Hart a job with DCW Trucking Company, a purportedly legitimate and lucrative cover business for the organization's criminal activity (*Hart*, 2007, para. 10). Hart took on a few delivery jobs for which he was paid modest sums of money. Once the police succeeded in establishing a sensible level of rapport with Hart, they introduced him to the criminal enterprise aspect of the organization, including dealing in fake credit cards, forged passports and fake casino chips (para. 17). As the scenarios progressed, Hart was given increased responsibilities and remuneration for his help. He travelled from St. John's to Halifax to Montreal and Vancouver at the organizations expense, quartered in some of Canada's finest hotels, and dined at some of this country's most opulent restaurants (para. 23). In total, Hart earned $15,720 for his participation in various purported activities (Brautigam, 2007b, A.8).

Financial inducements do not stop here. The relatively innocuous jobs targets have performed up to this point are nothing compared to the "big deal" or the promise of membership into the powerful and wealthy criminal organization. If the target can prove his or her loyalty to the organization by disclosing details of a criminal past he or she will be permitted to assist in this major criminal undertaking, earn thousands of dollars, and potentially secure a permanent position in the syndicate.

By setting up a legitimate business for the criminal organization, and allowing its members to use this business as a method to launder money, Jason Dix was told that he could earn up to $100,000.00 a year (*Dix*, 2002, para. 133). In *Bonisteel* (2008), the accused accompanied an undercover operative to a bank where they deposited $80,000

into a safe deposit box. The operative conveyed to the target that the key to the box and the $80,000 would be his once the job, a large drug shipment to be offloaded on Vancouver Island, was done (para. 16). In the same way, O.N.E. was promised a key to a safety deposit box containing $US50,000 (*O.N.E.*, 2000a, para. 25). What's more, upon completion of the drug offload, O.N.E. was told the organization would send her vacationing in Mexico where she would stay until the "heat" subsided (para. 26).

In *Mentuck* (2000b), the authorities employed the fall guy scenario, as described above. Undercover operatives explained to Mentuck that once the fall guy was convicted of the murder, the organization would provide him with a lawyer and the necessary financing to file a civil suit against the government for being wrongfully charged and jailed with respect to the murder (para. 90). Mr. Big told Mentuck that his lawyer estimated the settlement to be one million dollars and that Mentuck would stand to gain substantial proceeds from the lawsuit, a minimum of $85,000 or 10%, whichever was the greater, and a permanent job with the organization (*Mentuck*, 2000b, para. 90). Also, the accused would be granted an ongoing position with the criminal organization (*Mentuck*, 2000b, para. 99).

Regardless of its potential unreliability, confession evidence has long been recognized as compelling evidence of guilt, and is considered one of the most influential and authoritative components that can be presented to a judge and/or jury (Conti, 1999; Drizin & Leo, 2004; Dufraimont, 2008, Kassin, 2008; Kassin & Gudjonsson, 2004; Kassin & McNall, 1991; Kassin & Neumann, 1997; Kassin & Sukel, 1997; Kassin & Wrightsman, 1981,1985; Leo, 1992; Leo & Ofshe, 1998a; Loewy, 2007). According to one distinguished legal scholar, "the introduction of a confession makes the other aspects of a trial in court superfluous" (McCormick, 1972, 316).

While self-incriminating statements are held to be incontrovertible evidence of guilt, confessions serve as a recurring source of controversy, and careful scrutiny of the origin of the statement is imperative in determining voluntariness, trustworthiness and reliability (Kassin & Gudjonsson, 2004). For example, confessions that are motivated by relentless pressure, psychological manipulation, and the holding out of significant inducements (e.g. membership in a sophisticated and wealthy criminal organization), demands one to question the veracity of self-incriminating statements that originate from such circumstances.

What follows is an illustration and discussion of three specific techniques that emerged from the analysis that some claim increase the reliability of an accused's statements to undercover police officers.

**Techniques to Enhance the Reliability of Disclosures**

The RCMP has acknowledged that undercover operations compromise the reliability of statements made by targets, and that the Mr. Big technique could potentially offer up numerous reasons for a suspect to intentionally overestimate his or her participation and culpability in the alleged offence (Baron, 2008a; *Ciancio*, 2006, para. 169; *Henry*, 2003, para. 44). To offset the fallibilities associated with this undercover operation, a B.C. lawyer who represents the RCMP explained, "We know a lot of these individuals are not the sharpest knives in the drawer. We can exploit their naivete to get to the truth. But what we have to be careful about is that we do get to the truth" (Baron, 2008a, A.4). As a result, the RCMP maintains it has developed long-standing mechanisms that discourage falsification or even fabrication of statements, and "ensure the utterances obtained from an accused are reliable" (*Ciancio*, 2006, para. 268).[72]

[72] While a laudable goal, there is some question as to whether these techniques actually ensure the reliability of an accused's assertions.

Although police and prosecutors are aware of the dangers associated with the evidence of informants, informants are still used to secure critical evidence (Brodeur, 1992; Schehr & Sears, 2005; Macfarlane, 2006).[73] Macfarlane (2006) indicates that an established pattern exists between unreliable secondary sources (police informants, prison informants, etc.) and miscarriages of justice (para. 49).

The participants in Mr. Big stings are, by and large, undercover police officers. On occasion, the police have employed informants in attempt to get their targets to admit their involvement in the crime under investigation. In *Joseph* (2000) and *Mentuck* (2000b), informants were used primarily as proxies to introduce targets to the primary undercover police officer.

In *Ciancio* (2006), however, the RCMP hired a career criminal and associate of the target, Robert Moyes as an informant and as an agent. Due to the unique circumstances of the case at hand, the undercover officers were unable to befriend the target and gain his or her confidence over a period of time. Rather, they "were forced to rely on what was assumed to be an established and solid relationship" between Moyes (an informant) and the target (para. 269). Regarding the credibility and reliability of Moyes, Boyd J. stated:

> To say that Moyes is a career criminal falls far short of describing him. He became a heroin addict in his early teens. Approximately 35 of his 50 years have been spent in jail. During that period he has followed a well established pattern of successfully deceiving, manipulating, and lying to his treating psychologists, substance abuse counsellors, social workers, and parole officers and other prison authorities, thus earning their trust and a repeated "cascading down" of security levels within the corrections system. Following his well established pattern, once outside in the community, he has regularly breached that trust by abusing drugs and alcohol and very quickly returning to violent criminal activity (para. 19).

[73] The use of informants in undercover criminal investigations is seen as necessary tool to help solve serious criminal activity (i.e., narcotics investigations, organized crime, and political corruption) (Amir, 2003; Block, 1992; Brodeur, 1983; Friedland, 1982; Gross et al., 2005; Marx, 1981, 1988, 1992a, 1992b; Ross, 2008b; Thompson, 2006).

Boyd J, in her written decision, acknowledged the inherent difficulties of eliciting self-incriminating statements from the accused (para. 289). Nonetheless, while Ciancio's assertions were "consistent with him at least knowing about the murders", he disclosed nothing that was "particularly revealing or surprising" (para. 279). What's more, Boyd J. found no independent evidence to corroborate the informant's version of events (para. 289). As a result, the Crown failed to prove its case beyond a reasonable doubt, and the accused was acquitted of two counts of first-degree murder.

Baron (2008a) reports that the Mr. Big technique originated in the early 1990s, when an RCMP undercover police officer was investigating a murder and used a civilian agent to gather evidence (A.4). That undercover operation is said to have failed, and the crime remains unsolved. The officer recalled, "I thought, 'Why do we have to involve that third party? Why can't we go out and get it ourselves'" (Baron, 2008a, A.4). Most Mr. Big operations take place with undercover police officers forming relationships with the targets and gathering evidence. Informants appear to be limited to circumstances where the undercover police officers are unable to make the connections.

**Adherence to the Code of Trust, Honesty and Loyalty**

Undercover operators befriend the target and gain his or her confidence over a period of time through a series of scenarios. This is precisely what Justice Stewart meant by the "carefully structured relationship" he spoke of in *Creek* (1998). A fundamental theme that resonates throughout the operation is the adherence to "the code" of honesty, reliability and loyalty, the "fundamental tenets of the organization" (*Wilson*, 2007, para. 83). In *Lowe* (2004), C.L. Smith J. considered the significance of these themes, stating, "The homilies about the importance of honesty and coming clean with the boss were on occasion backed up by exemplary tales" (para. 236). To illustrate, undercover operatives stage unpleasant scenarios to show what happens to individuals

who deceive, cheat, or lie to the organization. Moreover, Mr. Big cautions that he will use his “sources” (e.g., reliable information from a police source) to inquire into the veracity of the target’s statements. It is important to restate that undercover police officers do not issue direct threats or act violently towards suspects. The bottom line according to the police is that targets are made well aware of, and understand the consequences associated with dishonesty.

**Contamination of Holdback Evidence**

Investigators, for tactical reasons, intentionally withhold specific elements of the crime, “evidence that only the actual killer could be expected to know” (*Fliss*, 2002, para. 58). Known as holdback evidence, these particulars help test the validity of the confession (*Black*, 2007, para. 630). This deliberate safeguard is, according to an RCMP lawyer, “the finest litmus test out there”, ensuring that any potential disclosures by the target are not undermined by suggestions or leading questions from interrogators, helping to preserve the integrity and trustworthiness of statements (Baron, 2008a, A.4; *Griffin*, 2001, para. 34; *MacMillan*, 2000, para. 23).

Contamination of holdback evidence in criminal investigation, however, is insidious. Contamination is the process whereby a suspect acquires special knowledge of a criminal event that is known only to the true perpetrator and/or the police (Leo & Ofshe, 1998, 438). Indeed, such knowledge of a criminal event can be obtained through a variety of sources, including the media, the police, crime scene visits, crime scene materials (e.g. photographs), details provided by a third party (i.e., disclosed during questioning whereby the interrogator transfers facts about the crime, facts disclosed by the real perpetrator), and in the case of smaller towns the information may circulate through community channels (Gudjonsson, 2003b, 180; Leo & Ofshe, 1998a, 438).

As stated earlier, undercover police officers elicited a confession from Patrick Fischer by suggesting that Mr. Big could hire an expert to help him beat a polygraph examination. Mr. Justice Hall, in writing the decision of the British Columbia Court of Appeal, stated:

> Unfortunately for the appellant, the evidence developed against him by the undercover operation was powerful. He gave to K. a wealth of detail about the homicide only the actual killer of Ms. Drefko could know. The site he pointed out to F. was a near perfect match of the location where the body was discovered, which is particularly damning because Fischer told the officers he placed the body in that location in the dark (*Fischer*, 2005, para. 55).

To recapitulate, the police withheld information related to the area where the body was located, and that the cause of death was manual strangulation (*Fischer*, 2005, para. 2). Is it possible that the holdback evidence Fischer disclosed to undercover operators was compromised? Bear in mind that the deceased's body was found on 15 May 1999, and the undercover operation commenced a year later in May 2000.

Concerning the location of the body, the 16 year-old girl's remains were discovered not by police, but by a group of 11 horseback riders from the lower mainland. Upon returning to the ranch, they informed the owner's 16-year-old son of their gruesome discovery, gave him directions, and asked him to contact the police. Linda Fischer, Patrick's mother, stated that on 15 May 1999, at least 20 local high school students attended what is colloquially known as "GangBang Flats" for a pre-grad party, and many of them camped out on Lilly Lake Road near the site where the body was found. At trial, four individuals testified to having seen the police cars as they were heading to the party. The following day, a helicopter was seen hovering over the site. In the days following the discovery of the body, the local newspaper, the Merritt Herald, ran a front-page story revealing the location of the body. Mrs. Fischer claims that at least 32

people knew that Drefko's body was located in a wooded area off Lilly Lake road (Fischer, 2006).

During the undercover operation, Fischer took one undercover officer to a location where he said he dumped the body. The British Columbia Court of Appeal noted, "This was not the precise location where the body had been discovered but it was less than 100 yards from the site. Fischer had pointed out a log to F. and the body was discovered by the riders near a log" (para. 20).

Although there was no specific disclosure to anyone that strangulation was the cause of death, the RCMP interviewed the sister of the deceased, Susan, in which the subject of "sleepers" was discussed (*Fischer*, 2005, para. 4). Linda Fischer writes, sleepers is a game "where pressure is applied to the major artery in the neck and people pass out and get a bit of a high" (Fischer, 2006). At trial, the accused testified that, following a conversation he had with Susan, he adduced that strangulation was the cause of death (para. 39).

Apart from Fischer's confession to the RCMP, there was no physical or forensic evidence linking Fischer to the murder (para. 18). Is it possible that Fischer was able to piece together a persuasive story based on news media accounts and what others had told him? On 30 November 2001, a jury convicted Patrick Fischer of the first-degree murder of Darci Drefko. The British Columbia Court of Appeal found no merit to his claims that he fabricated the story to impress the undercover officers, and dismissed his appeal from conviction. Finally, on further appeal to the Supreme Court of Canada, his application for leave to appeal was dismissed without reasons. The appeals process is exhausted and yet questions remain about the veracity of his admissions to undercover police.

This case highlights the importance of treating a confession as a neutral hypothesis. The holdback information provided by the suspect should be carefully compared to the known facts of the case—both within the police force and the public. Confirmation of the suspect's assertions should be sought through other independent, reliable evidence.

In some cases, the police minimize the amount of information the operative has about the crime and the target. In *C.K.R.S.* (2005), for example, the primary undercover operator posing as the main contact for the criminal organization was given a brief fact sheet containing minimal information. The fact sheet stated, in part, that the "Investigation reveals that C.K.R.S. is currently living in the Eastside area of Vancouver. C.K.R.S. is believed to be unemployed. He is also considered to be a violent individual and an abuser of alcohol and narcotics. C.K.R.S. has an extensive criminal record dating back to 1960" (para. 32). Also, in *Griffin* (2001), the primary undercover operator was given minimal information about the target and the investigation. Although she was told that the investigation related to a 20-year old homicide, she knew nothing else about the alleged crime including the cause of death, the location of the body, or the relationship, if any, between the accused to the deceased (*Griffin*, 2001, para. 34).

Within the 63 reasons for judgment reviewed, in only eight cases was there discussion about the accused disclosing details held back from the press releases in their confessions to undercover operatives.[74] While the disclosure of holdback evidence increases the trustworthiness of a self-incriminating statement, it is the discovery of further incriminating evidence (e.g. leading police to missing evidence), which was previously unknown to police, that further strengthens the validity of a confession (Gudjonsson, 2003b, 131). In another seven cases, the suspect disclosed information

[74] This study is not suggesting that suspects in the other cases did not disclose details withheld from publication, only that it was not discussed in the available data sources.

that was unknown to police. The case of *McCreery* (1998) is a leading exemplar of how the Mr. Big undercover strategy was able to unearth evidence which was previously unknown to police. On 15 August 1994, Landis Heal's former common law spouse called police to file a missing persons report (para. 5). In early October, the RCMP discovered the victim's vehicle abandoned in the bush, but were still unable to locate the victim. Following a number of tips, the RCMP mounted an undercover operation against Timothy McCreery in an attempt to learn if he was involved criminally in the death of the victim (para. 7). In the course of the undercover operation, the accused and the primary undercover operator were to attend a meeting with Mr. Big at a local hotel. The meeting was chalked up to a purported interview with the boss of the organization. Just before the interview, the operative told McCreery to be completely honest with the boss and that the boss might hire him (para. 11). During the interview the target informed Mr. Big that he had in fact kill Heal. Later that evening, McCreery directed undercover officers to the location of the victim's body, which was subsequently recovered as evidence (para. 12).

**Clandestine Audio and Video Recording**

The undercover investigation culminates in a lengthy meeting, which is akin to a job interview, between Mr. Big and the target regarding the target's future in the criminal organization (*Bicknell*, 2003, para. 103). The boss reiterates attributes the organization demands from its members, namely the importance trust and honesty. During the course of this meeting the target is confronted with questions about his or her involvement in the crime under investigation, and generally results in the suspect making inculpatory admissions (*Peterffy*, 2000, para. 6). These meetings, which are surreptitiously videotaped and audiotaped (pursuant to judicial authorization), are consistently held in hotel rooms because of the ease in equipping the room with surveillance equipment, and

also because members of the investigative team can monitor the meetings and surveillance equipment from adjacent rooms (*C.K.R.S.*, 2005, para. 41). They are prepared to move in immediately if things go awry. RCMP Supt. Lorne Schwartz admitted, “violence is rare, but it happens” (Baron, 2004b, A.8).[75] Where possible, and pursuant to judicial authorization, police will install recording devices wherever possible, such as safe houses and vehicles (Mentuck, 2000b; *United States of America v. Burns* 1997). In *Aubee* (2006), the pager given to the accused to remain in contact with the organization was a recording device. This operational plan was so clandestine, even the primary undercover operative was unaware of the device (para. 20).

According to Trotter (2004), the advantages that result from recording can be categorized as epistemological, behavioural and systemic (para. 48). From an epistemological standpoint, a videotaped record of the conversations between law enforcement officers and suspects provides an objective and authentic account of all that transpired during the interview/interrogation, which helps to attenuate forgetfulness and self-serving distortions in memory (Kassin, 2005, 225). Although detailed note taking by officers may capture the essence of what occurred, a video recording “preserves and conveys both the tone in which words were uttered and the body language of those present” (Trotter, 2004, para. 49).[76] As Mr. Justice Iacobucci pointed out in *Oickle* (2000), a recorded interrogation is of great value to a judge and/or jury as it provides them a means by which they can evaluate the reliability of the suspect’s confession, and thus decide how much probative value to attribute to it (para. 46).

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[75] In *Dix* (2001), Sergeant Greg Smith, NCO in charge of Undercover Coordination for the "K" Division of the RCMP (Edmonton, Alberta), testified that several undercover operations had to be terminated because officer safety was compromised (paras. 15-19).

[76] In the commission of inquiry into the wrongful conviction of Thomas Sophonow, The Honourable Mr. Justice Cory found “significant differences between the notes of the officers”, which led to serious disparities about what Sophonow said to investigators and what the investigators reported (Sophonow Inquiry, 2001).

From a behavioural perspective, the recordings allow the jury to examine the interactions, behaviour, and demeanour of both the target *and* the undercover operators (*Grandinetti*, 2003, para. 44). Under the gaze of a camera, the police will be more likely to conduct themselves in a professional manner and will be less likely to employ questionable interrogation practices (protecting the rights of the accused). Such recordings also shield the police from frivolous claims of police misconduct (Kassin, 2005, 225; Trotter, 2004, para. 51; White, 1997, 154). As noted by J.W. Williams J. in *Perovic* (2004a), "The Court's opportunity to understand and appreciate the actual atmosphere in the interview and the nuances of the exchange is enormously enhanced by the fact that a videotape of the entire event was available" (para. 77). In 44 of 63 cases, the videotaped conversations, as well as supplementary transcripts of the exchanges between the accused and Mr. Big, were admitted into evidence at trial and put before the trier of fact.[77]

Lastly, Trotter (2004) argues the videotaping of police interviews and interrogations systemically buttresses the overall reputation of the criminal justice system, increasing and/or restoring confidence in the administration of justice (para. 52). In the monumental case of *Miranda v. Arizona* (1966), Chief Justice Earl Warren of the Supreme Court of the United States stated that interrogations generally take place in privacy and that "privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation room" (*Miranda v. Arizona*, 384 U.S. 436, 448, 1966). Thus, the electronic recording of all police interviews and interrogations allows the public to examine what has typically been a behind-closed-doors process (Gudjonsson, 2003b, 22).

[77] The videotape recordings of conversations between target and undercover officers, and the transcripts thereof, might have been used in additional cases, but this information was not available in the material accessed by the researcher.

Inbau et al. (2001), authors of the leading interrogation manual, *Criminal Interrogation and Confessions*, contend "The principal psychological factor contributing to a successful interrogation is privacy—being alone with the person during questioning" (51). While privacy and isolation are important factors during the interrogation process, Justice Iacobucci, for the majority in *Oickle* (2001), stated, the law "cannot countenance secrecy" (para. 46). Although not yet required by law, the overall consensus amongst commentators in the area is the need for a policy that mandates the videotaping of all interviews and interrogations (Cassell, 1996a, 1996b, 1999; Conti, 1999; Drizin & Colgan, 2001; Drizin & Leo, 2004; Gohara, 2005; Gudjonsson, 1992, 2003b; Inbau et al., 1986; Johnson, 1997; Kassin, 2005; Kassin & Gudjonsson, 2004; Leo, 2005; Leo & Ofshe, 1998b; Loewy, 2007; Marx, 1988; Ofshe & Leo, 1997b; Penney, 2004; Sangero, 2007; Silbey, 2006; Soree, 2005; Thurlow, 2005; Trotter, 2004; White, 1997). The same arguments can be made to record interrogations in undercover Mr. Big investigations.

The Honourable Mr. Justice Cory, in the commission of inquiry into the wrongful conviction of Thomas Sophonow, identified several disquieting, multi-faceted errors penetrating all levels of the criminal justice system that led to Sophonow's wrongful conviction and imprisonment. In his report, Mr. Justice Cory took issue with the manner in which Sophonow was interrogated. In addition to being questioned for prolonged periods of time, the interrogation was not conducted in the manner described by the two interrogating officers. What transpired during the course of the interrogation was not properly transcribed, which led to serious disparities about what Sophonow said to investigators and what the investigators reported (Manitoba Justice, 2001). As a result, Justice Cory made three specific recommendations urging for the video recording of all police interrogations:

> The evidence pertaining to statements given by an accused will always be of great importance in a trial. The possibility of errors occurring in

manually transcribing a verbal statement by anyone other than a skilled shorthand reporter is great; the possibility of misinterpreting the words of the accused is great; and the possibility of abusive procedures, although slight, exists in those circumstances. That, coupled with the ease with which a tape recording can be made, make it necessary to exclude unrecorded statements of an accused. It is the only sure means of avoiding the admission of inaccurate, misinterpreted and false statements.

I would recommend that videotaping of interviews with suspects be made a rule and an adequate explanation given before the audiotaping of an interview is accepted as admissible. This is to say, all interviews must be videotaped or, at the very least, audiotaped.

Further, interviews that are not taped should, as a general rule, be inadmissible. There is too great a danger in admitting oral statements. They are not verbatim and are subject to misinterpretation and errors, particularly of omission. Their dangers are too many and too serious to permit admission. Tape recorders are sufficiently inexpensive and accessible that they can be provided to all investigating officers and used to record the statements of any suspect (Manitoba Justice, 2001).

# CHAPTER FIVE: CONCLUSIONS

Non-custodial police interrogation techniques are probably one of the most fundamental and overlooked forms of subterfuge when it comes to investigating crimes. This thesis set out to provide greater awareness and a better understanding of the nature and scope of a controversial undercover investigative technique widely known as the Mr. Big scenario. An analysis of emerging trends in judicial decisions over the past 16 years helped trace the emergence, advancement, and sustainability of this post-offence undercover interrogation technique. The findings of the foregoing analysis clearly demonstrate how contentious an issue Mr. Big is, with a multitude of contradictory evidence for and against the use of this controversial undercover investigative strategy.

In terms of success, the Mr. Big investigative technique provides law enforcement officers a last-resort effort to gather otherwise unavailable information about a criminal event and suspect, secure crucial evidence, and in most cases, obtain a conviction in serious criminal investigations that have reached an impasse (*Hathway*, 2007, para. 8; Motto & June, 2000, 2). Indeed, these investigative files can lay dormant for an extended period of time, and if it were not for this investigational technique these crimes would almost certainly remain unsolved and shelved as cold case files indefinitely (*Black*, 2006, para. 77; *Cretney*, 1999, para. 4; *Ethier*, 2004, paras. 8-10; *Simmonds*, 2000, para. 6; *Skiffington*, 2004, para. 8).

By way of illustration, On 15 February 1994, following a trial by judge and jury, Gregory Parsons was found guilty of the second-degree murder of his mother, Catherine Ann Carroll, and was subsequently sentenced to life imprisonment with no eligibility for

parole for fifteen years (*Parsons*, 1996, para. 1). O'Neill J.A., for the Newfoundland Court of Appeal, observed that there was no direct evidence implicating Gregory Parsons in the death of his mother; the Crown's case was circumstantial (para. 40). In addition, the court found that the prejudicial effect of other pieces of evidence substantially outweighed any probative value there might have been. O'Neill J.A. ruled, "the errors of law which I have found here are serious ones and I cannot conclude that the verdict would necessarily have been the same if these errors had not occurred" (para. 68). Gregory Parsons' conviction was quashed on appeal, and the Newfoundland Court of Appeal ordered a new trial (para. 71).

As a result of sophisticated technological advancements in DNA analysis in late 1995, the RCMP Crime Laboratory in Ottawa commenced the use of a new method of DNA analysis, called PCR (STR) (Government of Newfoundland and Labrador, 1998). This new method of analysis required a minimal sample of DNA compared to its predecessor, RFLP analysis. DNA analysis completed by the crime laboratory in Ottawa revealed, "the male DNA found on the submitted items was not that of Gregory Parsons" (Government of Newfoundland and Labrador, 1998). As a result, the Crown entered a stay of proceedings in the case against Gregory Parsons. While Parsons received an apology from both the Minister of Justice and Attorney General, and was offered compensation (*Doyle*, 2003, para. 2), his mother's killer remained at large.

The newly acquired DNA evidence enabled the police to renew a more broadly focused investigation. The Royal Newfoundland Constabulary set its sights on Brian Doyle, targeting him in a Mr. Big undercover operation. During this investigation, Doyle identified the site where the murder weapon could be found. The result of all of this, according to Green C.J.T.D. of the Newfoundland and Labrador Supreme Court, was

that 12 years after Catherine Carroll's death, the answer to the question of who killed her could finally be answered (*Doyle*, 2003, para. 5).

It is often the case, however, that the accused person's self-incriminating statements to undercover police officers are essential to the prosecution's case. Without them, there would be no basis for a conviction (see *Griffin*, 2001). Serious questions arise as to whether these confessions are reliable. Although a confession obtained by virtue of a Mr. Big operation might not be the result of direct threats or outright violence, undercover operatives cultivate an atmosphere of fear and intimidation to convey a convincingly corrupt image, and as such, targets may confess out of fear of reprisal. Also, statements are invariably induced by promises of wealth and professional advancement in a sophisticated criminal organization, not to mention the anticipation of avoiding criminal sanction by having the organization help conceal the crime. Despite integrated safeguards that the RCMP say "ensure" assertions obtained from targets are trustworthy, these circumstances gravely undermine the reliability of self-incriminating statements, and could increase the chances that an innocent person might confess to a crime they did not commit. Conceivably, a conviction can be sustained on the basis of confession evidence alone, even when the validity of the confession is brought into question.

As the empirical data in this thesis demonstrate, the suspect's admission of guilt to undercover police officers is often of central importance to the prosecution's case, if not the only substantive piece of evidence linking the accused to the crime. It is essential to restate here that confession evidence has been shown to have a significant biasing effect on the perceptions and decision-making process of jurors (Conti, 1999; Driver, 1968; Drizin & Leo, 2004; Kassin & Sukel, 1997; Kassin & Neumann, 1997; Kassin & Wrightsman, 1980, 1981; Leo & Ofshe, 1998a; Wrightsman, Nietzel & Fortune, 1994).

As Wrightsman (1991) points out, “It seems that what you say is more influential than why you say it” (170). All things considered, confession evidence is often seen as incontrovertible evidence of guilt. Accordingly, it is essential that the Canadian criminal justice system have in place measures to minimize the risk that innocent people will confess to, and subsequently be convicted of, crimes they did not commit.

## “Setting Public Policy on the Parameters of Undercover Operations” [78]

Conceptually, the Mr. Big investigative technique is a potentially beneficial one, creatively fashioned to obtain incriminating evidence in the form of a confession from a suspect in serious criminal investigations that have reached an impasse, complete with built-in safeguards to avoid eliciting unreliable, misleading, and/or erroneous information from unwitting suspects. As this analysis has shown, however, the potential for false confessions also exists. Although modern psychological interrogation techniques are designed to secure incriminating information from allegedly guilty suspects, interrogators are equally capable of eliciting confessions from innocent persons (Kassin, 1997, 221). Ofshe and Leo (1997b) point out that modern interrogation tactics, “if misdirected, used ineptly, or utilized improperly, sometimes convince ordinary, psychologically and intellectually normal individuals to falsely confess” (984). To prevent the elicitation of erroneous confessions and the miscarriages of justice that might ensue, Drizin and Leo (2004) recommend greater education and training of law enforcement personnel about the causes, indicators, and consequences of false confessions (997-1003).

This section examines a number of legal reforms to the Mr. Big operation that could help prevent the elicitation of false confessions and further miscarriages of justice

[78] This quotation is taken from *Unger* (1993a). With respect to the Mr. Big undercover operation, the Manitoba Court of Appeal stated, “Courts should not be setting public policy on the parameters of undercover operations” (para. 69).

in the Canadian criminal justice system. These recommendations include: 1) requiring the police to obtain prior judicial authorization to conduct a Mr. Big operation; 2) treating self-incriminating statements obtained in Mr. Big operations as hearsay that require necessity and reliability as preconditions to their admissibility; 3) requiring corroboration for statements made in a Mr. Big investigation; 4) requiring that jurors be warned of the possibility of false admissions; 5) the use of expert evidence to assist the trier of fact; 6) extending the right to silence, as protected by section 7 of the *Canadian Charter of Rights and Freedoms*, to this undercover technique; 7) treating undercover police officers as persons in authority and therefore requiring that admissions be voluntary; and 8) adopting a general exclusionary rule with respect to confessions obtained by virtue of Mr. Big undercover operations.

## Obtaining Prior Judicial Authorization

The data from this thesis illustrate that undercover police officers, posing as members of a sophisticated criminal organization in their endeavour to ascertain whether the suspect is criminally responsible, employ interrogation tactics that call into question the voluntariness of, and undermine the reliability of, assertions made by the target. As a matter of policy, would it be possible to establish procedural parameters limiting the type and size of inducements police officers hold out to targets, as well as restrict violence, intimidation, psychological manipulation and implied threats of physical harm utilized to convey convincingly corrupt image? While a great number of critics have called for an outright ban on this controversial technique, some legal commentators have proposed the requirement for prior judicial authorization as a means to limit these undercover operations. Penney (2004), for example, writes:

> if we were truly concerned about protecting suspects from unwarranted invasions of privacy and betrayals of trust, then police would be required to obtain prior authorization for all undercover elicitation attempts

> (whether before or after detention), just as we do for electronic surveillance (328).

Presently, police officers obtain prior judicial authorization under either section 184.2 of the *Criminal Code* to intercept communications by consent of one of the parties (usually Mr. Big or a police informant) or under section 186 to intercept private communications without the consent of either party. Authorizations under section 184.2 are much easier to obtain than authorizations under section 186 which require police officers to establish:

> (a) that it would be in the best interests of the administration of justice to do so; and
>
> (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.[79]

In this study, authorization for consent surveillance (i.e., section 184.2) was mentioned in nine cases and authorization for surveillance without consent (i.e., section 186) was mentioned in eleven cases.[80] Obviously, if the police are only concerned with the discussions between their operatives and the target, section 184.2 authorization is sufficient. Otherwise, they will need to undergo the more onerous task of applying for authorization under section 186.

Given the importance of recording confessions to Mr. Big, one might assume that the police apply for one or the other type of authorization in most scenarios and that they disclose aspects of their Mr. Big plans to the authorizing judge. This appeared obvious,

[79] See Brockman and Rose (2006) for other differences between judicial authorization for consent surveillance and judicial authorization for surveillance where neither party consents (208).

[80] There were a number of other cases that referred to judicial authorization but it was unclear which section was used to obtain it.

for instance, in Hewak C.J.Q.B.'s ruling concerning the admissibility of intercepted conversations between the accused and undercover officers in *Unger* (1992):

> The undercover operation occurred in circumstances of necessity. Clearly other normal investigative procedures had been tried, but had not succeeded, and in the opinion of the investigating police officers were unlikely to succeed. They felt that if the accused Unger had been approached by police officers in any direct fashion, based on his previous reaction to them, they would have been unsuccessful in receiving any useful or additional information from him. There was no other method by which this information could be obtained (para. 15).
>
> Unquestionably, the crime with which we are concerned, is a particularly brutal killing of a young girl. That killing would have been left unsolved without the kind of information that the undercover police were able to obtain from the accused Unger (para. 17).

Be that as it may, it is doubtful that the evidence disclosed in the officers' affidavits filed in support of the request for an authorization outline specified their undercover methodology and operational plans or that the judge scrutinized the Mr. Big operation for the possibility of producing unreliable evidence. There is even less scrutiny required to obtain authorization for consent surveillance under section 184.2. As noted by Romilly J, in *McCreery* (1996), "the requirements for obtaining the authorization under the consent provision are not as stringent under s. 184.2 as those under s. 186" because officers need not demonstrate investigative necessity (para. 38).[81] Furthermore, a Mr. Big operation can conceivably commence without the interception of private communication and therefore without any prior judicial authorization for electronic surveillance. Should the police be required to obtain authorization for a Mr. Big scenario, and give a detailed explanation of their operational plans?

While the overall undercover operation has a central theme, and some scenarios may be scripted and planned, most of the meetings are developed as a result of the

[81] Section 184.2(3) of the *Criminal Code* sets out the requirements for obtaining an authorization under the consent provision.

target's reaction to scenarios previously played out (*Hart*, para. 19). That is to say, officers may have but a moment's notice to engage a suspect in a scenario, thus requiring police to improvise as the operation unfolds. Testifying before a superior court judge in Quebec, RCMP officer Serge Coulombe said, "It's like writing a book, with chapters that follow one another" (Cherry, 2005, p. A.8). Another undercover operative stated, "Everything is based on day-to-day situations and how the target reacts to what happened that day" (Baron, 2008b, p. A.8).

While there is some merit to the suggestion that the police receive prior authorization before conducting a Mr. Big operation, there are numerous complications that could arise. As alluded to earlier, only a handful of investigators are made aware of the holdback evidence in an investigation. This tactical decision helps to prevent contamination and preserve the integrity and trustworthiness of suspects' assertions. Compelling the police to disclose these particulars in their affidavits increases the number of people privy to those details, and thus increasing the possibility of contamination. Furthermore, once we start limiting the range of tactics police officers are able to employ, their ability to convey the impression that they are hardened and ruthless criminals becomes a difficult task. These kinds of strictures not only run the risk of compromising the investigation, more importantly, they undermine officer safety, and the protection of law enforcement officers is paramount.

While it remains open to conjecture, one can tacitly speculate that the three techniques to enhance the reliability of disclosures discussed in Chapter Four,[82] in combination with proper education and training of law enforcement personnel about the "causes, indicia, and consequences of false confessions", could theoretically work to

[82] The three techniques include the adherence to the code of trust, honesty and loyalty, contamination of holdback evidence, and clandestine audio and video recording, 81-90.

prevent the elicitation of false confessions (Drizin & Leo, 2004, 997). Perhaps more useful might be a more thorough screening of the alleged confessions at the trial stage.

## A Principled Approach Requirement of Necessity and Reliability

As stated elsewhere in this thesis, whether an out-of-court statement made by an accused person to an undercover police officer is regarded as an exception to the hearsay rule requiring the Crown to prove necessity and reliability is an issue that has yet to be resolved by Canada's highest court. However, the majority of decisions on Mr. Big operations have come down in favour of not treating admissions in Mr. Big operations as hearsay requiring necessity and reliability as prerequisites to the statements being admitted as evidence against the accused. The admissions exception to the hearsay rule rests on the assumption that admissions against interest are sufficiently reliable to be admitted as substantive evidence because people do not commonly make statements against their own interest unless they are true (Brockman & Rose, 2006, 220). The quandary that arises with regard to this statement is that a target's confession to undercover police officers posing as criminals is "not against interest since the suspect believes that it is in his interest to admit to a crime to fellow criminals" (*Osmar*, 2007, para. 52). For that reason, the courts or Parliament should consider changing the law so that admissions made during Mr. Big scenarios are exceptions to the hearsay rule requiring necessity and reliability as preconditions to their admissibility.

There was no argument put forward on the issue of necessity in any of the ten cases where the accused argued that his or her admissions to undercover police officers were hearsay requiring the application of necessity and reliability analysis of the

principled exception to the hearsay rule.[83] As explained by Menzies J, in *Bridges* (2005), "The statements of the accused can only be obtained through his mouth and as he is not a compellable witness in his own trial, the statements given to the undercover police officer are the only other source of this evidence" (para. 13).

Concerning the criterion of reliability, the role of the trial judge is limited to ascertaining whether the hearsay statement "exhibits sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement" (*Hawkins*, 1996, para. 75). The ultimate reliability or truth of the hearsay statement, and the weight to be attached to it, remain determinations for the trier of fact (para. 75).

Both the Alberta Court of Appeal in *Wytyshyn* (2002), and the British Columbia Court of Appeal in *Bridges* (2005), applied the necessity and reliability analysis of the principled exception to the hearsay rule, and both courts ruled that the accuseds' statements to undercover police officers met the requisite indicia of necessity and reliability. Even in cases where the judiciary ruled that the accuseds' confession was an exception to the hearsay rule, those statements were held to be admissible because the evidence, in any event, supported a finding of threshold reliability (*Perovic*, 2004a, paras. 21-23). In addition, Mr. Justice McEwan, in *MacMillan* (2003) stated, "I am mindful of the rule in *In Re Hansard Spruce Mills* [1954] (cited above) to the effect that I should not differ from a ruling by another judge of this court, particularly one on the same set of facts…" (para. 33). Thus, it makes intuitive sense to suggest that, with the exception of extraordinary circumstances, the judiciary will invariably rule the accuseds' confession to Mr. Big meets the required degree of threshold reliability.

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[83] One of the evidentiary dangers normally associated with the admission of hearsay evidence is the "inability of the trier of fact to assess the demeanour of the declarant" (*Hawkins*, 1996, para. 67). One approach that could alleviate such concerns is to require the mandatory videotaping of all undercover elicitation attempts, thus giving the trier of fact the ability to assess the demeanour of the accused.

Taking into account the circumstance in which a statement is obtained, is a threshold test for reliability sufficient? Would it be dangerous to accept an accused person's confession as reliable without confirmation from some other independent source?

## Requiring Corroboration

That confession evidence is often unreliable and the basis for miscarriages of justice is no longer conjecture and is a reality supported by the extant literature on the general phenomenon of false confession (Gohara, 2005, 837). Gohara (2005) suggests, "no criminal prosecution should proceed on the basis of the defendant's uncorroborated self-incriminating statement alone" (837).[84] Rather than conveying to the jury the inherent unreliability of an accused person's confession, and "the significance in finding confirmation of the content of the confession in other independent evidence" (*McCreery*, 1998, para. 26), statements obtained as a result of a Mr. Big sting should be prima facie inadmissible as evidence *unless* there *is* confirmation by other independent, reliable evidence.

Drizin and Leo (2004) suggest that initially, a confession "should be treated as a neutral hypothesis to be objectively tested against the case facts" (999). If the suspect gives a comprehensive narrative that is consistent with the facts of the case, discloses information that was unknown to police or is corroborated by other independent, reliable evidence, such as a guilty knowledge of the crime (e.g., leading police to missing evidence, giving details that only the perpetrator would know), then the confession demonstrates an indicia of reliability and high probative value (Gudjonsson, 1992, 259; Leo & Ofshe, 1998a, 439; *Osmar*, 2007, para. 62). Conversely, if the suspect does not possess actual knowledge of the crime, is unable to provide accurate information not

[84] Also see Sangero (2007).

already known to the police, gives demonstrably incorrect details about the crime scene, then the statement should be considered unreliable and have no evidentiary value (Leo & Ofshe, 1998a, 439). In addition, Leo and Ofshe (1998a) posit it is the mundane details related to the criminal event that are of great worth in determining guilt or innocence because mundane facts are "less likely to be the result of contamination by the police" (440).[85]

## Mandatory Warnings to Jurors

If a confession is ruled admissible, it should be followed by a mandatory instruction to the jury about the inherent unreliability of a confession made in these non-custodial circumstances. A priority for the criminal courts should be a "specific formulation" of a Hodgson-type warning, as it relates to the reliability of the statements made by the accused to undercover police officers, that goes beyond advising the trier of fact that "a confession obtained under oppressive or fearful circumstances may not be reliable and must be scrutinized with care" (*Carter*, 2001, para. 59). While this statement is well intentioned, it does little to enlighten laypeople about the elements of modern psychological interrogation (particularly the processes involved in the Mr. Big Strategy) that result in false confessions, and does little to counterbalance the psychological myth of interrogation, that innocent people sometimes confess to crimes that they did not commit (Dufraimont, 2008, para. 13).

[85] As a alternative method of evaluating the validity of a confession, Leo and Ofshe (1997b, 1998a) contend that there are at least three ways to determine the reliability of a confession: (1) Does the suspect's statement lead to the discovery of evidence that was previously unknown to the police (e.g., a location of a missing murder weapon, or a body)? (2) Does it include highly unusual features of the crime that have been held back from the public (e.g., details of how the body was discovered, the cause of death)? (3) Does the suspect provide accurate descriptions of the mundane details pertaining to the crime scene, which have not been made public (e.g., the type of clothing the victim was wearing)? (cited in Gudjonsson, 2003b, 179).

Although a confession obtained by virtue of a Mr. Big undercover operation might not be the result of direct threats or outright violence, the opportunity structure (e.g., financial inducements, professional advancement), coupled with an atmosphere of fear and intimidation, could increase the likelihood that an innocent person might confess to a crime they did not commit. More needs to be done to sensitize jurors about the frailties of confessions made in undercover operations like the Mr. Big strategy. Dufraimont (2008) argues that a cautionary instruction ought to "convey the necessary education about unreliable confessions, while remaining as unambiguous and protracted as possible" (para. 59). Justice Williams' forthright statement in Perovic (2004b) would be an appropriate foundation. Both the content and language of this prospective instruction are not overly esoteric so as to confuse the trier of fact:

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

Some commentators have indicated that confession evidence influences not only the perceptions and decision-making of lay jurors, but also of criminal justice officials (i.e., judges) (Kassin & Sukel, 1997, 42-44; Leo, 1996a, 301; Leo, 2007, 31; Leo & Ofshe, 1998a, 478). Penney (2004), for instance, suggests that some judges might not be sufficiently conscious of, or are ill-informed, about the phenomenon of false confessions (296). Thus, in circumstances where the accused elects a trial by superior court judge alone, it is imperative that the warnings extend to the judiciary as well. This is especially important in cases involving confessions obtained by virtue of a Mr. Big

operation because the accused (and co-accused, where applicable), in 20 of the 63 cases, were tried before a superior court justice alone.

## The Use of Expert Opinion Evidence to Assist the Trier of Fact

Although opinion evidence is generally prohibited at trial, there is an established exception to the rule that permits an expert to give opinion evidence if it is necessary to assist the trier of fact on an issue that is outside their experience or knowledge (Brockman & Rose, 2006, 306). In other words, it must be relevant to a fact in issue. In *Mohan* (1994) Mr. Justice Sopinka clarified the circumstances in which expert evidence is admissible as evidence. In order for an expert witness's testimony to be admissible as evidence the trial judge must be satisfied that the he or she has the appropriate expertise, which is contingent on the following four criteria: relevance, necessity in assisting the trier of fact, the absence of any exclusionary rule, and a properly qualified expert (para. 17). Is the Mr. Big scenario a matter for which expert evidence is required?

At Timothy Osmar's trial, counsel for the accused sought to call Dr. Richard Ofshe to testify about the reasons for which suspects falsely confess and the proper method for evaluating the reliability of a confession. On a *voir dire*, Dr. Ofshe explained that,

> where the reasons not to confess are sufficiently reduced by making the suspect believe that resistance is hopeless and that some advantage may come from confession, both the likelihood of confession and the risk of false confession will rise. It may eventually become attractive to a suspect to admit a crime (*Osmar*, 2007, para. 20).

In addition, he testified that, indeed, the counterintuitive notion that people would not confess to a crime they did not commit is still very much prevalent among laypeople and criminal justice officials. His role as an expert would be "to try to dispel certain myths that are widely held, and also to make clear a simple analytic structure for understanding

this particular interrogation strategy" (para. 62). Lastly, it was Dr. Richard Ofshe's opinion that the accused's confession to undercover police officers was contaminated with information relayed to Osmar by investigating officers who interrogated him prior to the undercover operation (para. 21). As such, he delineated the process for evaluating the veracity of a confession.

Dr. Ofshe conceded that he had not studied the Mr. Big strategy *per se*, "but believed that his analysis of statements to known persons in authority could be adapted to the Mr. Big method" (para. 20). Since he was proposing to apply his expertise in custodial interrogations to the Mr. Big strategy, the trial judge was of the view that he was advancing a novel scientific theory and should therefore be subject to special scrutiny to determine whether it met a specific threshold (para. 63).[86] Having applied the test for the admission of expert evidence set out *Mohan* (1994) and *J.-L.J.* (2000), the trial judge held that Dr. Ofshe's evidence "did not meet the requirements of relevancy and necessity for admission of expert evidence" (*Osmar*, 2007, paras. 63-4). The Ontario Court of Appeal affirmed Justice Platana's ruling.[87] Justice Marc Rosenberg, for the Court, held that Dr. Ofshe's evidence "was not about matters on which ordinary people are unlikely to form a correct judgment" (para. 68).

The British Columbia Court of Appeal in *Bonisteel* (2008) was asked to decide whether the trial judge erred by not allowing the appellant to call a psychologist to give expert opinion evidence on false confessions (para. 25). Paralleling the aforementioned case, the expert witness was not familiar with the specific undercover operation in issue.

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[86] The Supreme Court of Canada's decision in *J.-L.J.* (2000) addressed the admissibility of expert evidence involving novel science. In evaluating the soundness of a novel scientific theory, the Court delineated four factors that would determine the admissibility of novel science: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error or the existence of standards; and, (4) whether the theory or technique used has been generally accepted (*J.-L.J.,* 2000, para. 33).

[87] Leave to appeal to SCC refused, [2007] S.C.C.A. No. 157.

Moreover, the psychologist's evidence was based not on a clinical evaluation or interview, but on a review of the relevant literature (para. 62). Citing the test for the admissibility of expert evidence established in *Mohan* (1994), the trial judge not surprisingly ruled the psychologist's evidence inadmissible because it was neither relevant nor necessary to assist the trier of fact. On appeal, Madam Justice Levine saw no reason to interfere with the trial judge's ruling, finding that the proposed evidence "did not deal with the specific nature of the evidence in this case, but only with matters about which the jury could form a judgment based on their own experience, assisted by instructions from the trial judge" (para. 69).

Given the fact that the scientific foundation behind the phenomenon of false confession is still in its formative years, the debate as to whether this body of literature has "reached a sufficient level of maturity for the purposes of expert testimony" continues (Trotter, 2004, para. 32). The courts here in Canada have ruled expert evidence related to the phenomenon of false confession inadmissible, and it remains categorized as a novel science (Dufraimont, 2008; Trotter, 2004). As evidenced in the two preceding cases, advancing a theory that proposes to explain the counterintuitive myth of psychological interrogation, that innocent people sometimes confess to crimes that they did not commit, has been rejected by the courts as not "likely to be outside the experience and knowledge of a judge or jury" (*Mohan*, 1994, para. 22). While commentators in this area agree that this knowledge can be conveyed to the jury via judicial instruction, they posit that jurors are unlikely to understand *how* and *why* the phenomenon of false confession occurs (Dufraimont, 2008; Trotter, 2004).

The conduct of an accused person during an interrogation, especially when subjected to modern psychological interrogation techniques, is not within the normal experience of jurors. It is the role of the jury to determine the ultimate reliability of an out-

of-court statement, and the weight to be attached to it. Given the Supreme Court of Canada's recognition in *Oickle* (2000) that false confessions stem from exceptional techniques or strategies employed by the police during interrogation, expert evidence related to these specific techniques, and how they undermine the reliability of confessions obtained there from, would be of great assistance to a jury in determining the truth or falsehood of assertions made by an accused person (See Trotter, 2004, para. 27).

While the credibility and admissibility of expert psychological testimony in relation to disputed confessions has been met with dissension by Canadian criminal courts, Gudjonsson (2003a) points out that in the U.K., the expert opinion of clinical psychologists has had a profound effect on the practice and ruling of the Court of Appeal Court in England and Wales, and the British House of Lords (159). He reviewed 22 high-profile murder cases in England and Wales where convictions based on confession evidence were overturned on appeal between 1989 and 2001 (Gudjonsson, 2003a, 165). In 11 of the 22 cases he reviewed, Gudjonsson found the psychological evidence to be most influential on appeal.

As Gudjonsson's (2003a) interactional model for assessing the outcome of police interviews illustrates, there are numerous potential factors that make some individuals more susceptible to the pressures of modern psychological interrogation, and the underlying message from his analysis is that "each case must be considered on its own merit" (165). Within his sample of cases, a recurring issue that led to the suspect giving erroneous confessions was the inability of the suspect to cope with the pressures of custody and police questioning (165). This analysis, although modest, confirms the notion that false confessions can be elicited from cognitively and intellectually normal individuals (Leo & Ofshe, 1998a; Drizin & Leo, 2004, Gudjonsson, 2003b).

The next recommendation advocates extending an accused's constitutional right to silence as protected by section 7 of the *Canadian Charter of Rights and Freedoms*.

## The Constitutional Right to Silence

To recapitulate, the seminal authority with respect to an accused person's constitutional right to silence, as protected by section 7 of the *Charter*, is the Supreme Court of Canada's decision in *Hebert* (1990). According to Madam Justice McLachlin, "The jurisprudence relating to the right to silence has never extended protection against police tricks to the pre-detention period. Nor does the Charter extend the right to counsel to pre-detention investigations" (para. 74).[88] As such, the Courts have invariably ruled that undercover operatives who engage suspects in a Mr. Big scenario do not have control over an individual's movements so as to deprive the suspect of their constitutional right to silence. The undercover operation takes place during the investigative stage, and suspects are not being detained for investigative purposes or placed under arrest at the material time statements are made to undercover officers.

Returning to the Supreme Court of Canada's decision in *Hebert* (1990), Wilson and Sopinka JJ. dissented from the majority decision, expressing the view that the right to silence "must arise whenever the coercive power of the state is brought to bear upon the citizen. I think that this could well predate detention and extend to the police interrogation of a suspect" (para. 94).

It is easy to see how this distinction can be blurred, and suspects who make self-incriminating statements to undercover operators, in certain circumstances, are theoretically deprived of a "free and meaningful choice as to whether to speak to the

[88] Penney (2004) argues that the reason why the constitutional right to silence is not extended to non-detained suspects is because "detention shifts the nature of the moral relationship between criminal suspects and the state" (327).

authorities or to remain silent" (*Hebert*, 1990, para. 67). In *McIntyre* (1993), Rice J.A. was heedful of the fact that at the time of his arrest and detention, and after consulting with legal counsel, McIntyre informed the police of his choice to remain silent (para. 12). Notwithstanding his choice to remain silent, the police placed a "cell plant" in McIntyre's cell in order to initiate contact with, and introduce him to an undercover operative purporting to be a criminal and ex-convict. Upon his release from custody, this criminal figure was able to locate him in the community and, after some time, elicit self-incriminating statements from McIntyre. As Mr. Justice Rice observed in his dissenting opinion, the "cell plant" operation undertaken by undercover operatives had its "beginnings during detention", and "successfully continued afterward" (para. 15). While the Supreme Court of Canada dismissed McIntyre's appeal on this issue, it did so in oral reasons without a full analysis.

It is the recommendation of this researcher that the Courts re-consider extending the scope of an accused person's constitutional right to silence to suspects targeted in Mr. Big operations, particularly in circumstances where undercover operatives initiate contact with their target while in police custody (i.e., placing an undercover operator posing as a criminal in a police transport vehicle or in a holding cell with the suspect). Perhaps the right to remain silent should extend to all Mr. Big operations.

If an accused person's constitutional right to silence is violated during a Mr. Big operation by an agent of the state, he or she may seek a remedy under section 24(2) of the Charter. In *Collins* (1987), Lamer J. writing the majority decision, outlined three factors the courts should consider when determining whether the evidence obtained is to be excluded under s. 24(2) of the Charter: 1) factors that affect the fairness of the trial, 2) factors which are relevant to the seriousness of the Charter violation, and 3) those which relate to any disrepute that may result from the exclusion of the evidence (paras. 36-

39).[89] In *McIntyre* (1993), Rice J.A., in dissent, stated, "In weighing the contempt of the police officers with respect to the appellant's constitutional rights together with the negative repercussions which the admission into evidence of this conversation would have on the fairness of the trial, with the three factors set out in Collins, it is my view that the use of this statement would bring the administration of justice into disrepute and that it must be excluded under subsection 24(2) of the Charter" (para. 23).

If the right to remain silent was extended to all pre-detention circumstances, the ramifications would mean that undercover police officers would be prohibited from actively eliciting information from suspects who are not detained. Madam Justice McLachlin observed that in "the absence of eliciting behaviour on the part of the police, there [would be] no violation of the accused's right to choose whether or not to speak to the police. If the suspect speaks, it is by his or her own choice, and he or she must be taken to have accepted the risk that the recipient may inform the police" (para. 76). Without the ability to actively elicit statements from a suspect during the Mr. Big interrogatory ruse, would the police be able to feasibly conduct a MR. Big scenario? In theory, yes, but it would take much longer to conduct an undercover investigation. Would this change bring about the disintegration and downfall of the Mr. Big investigative strategy?

## Modifying the Common Law Confessions Rule

The common law confessions rule, which requires the Crown to prove that statements made by an accused to a person in authority were made voluntarily, is ostensibly thought to safeguard against false confessions (*Oickle*, 2000, para 32). As a preventive mechanism, the rule is intended to "recognize which interrogation techniques

[89] The Supreme Court of Canada in *Stillman* (1997) elaborated on the manner in which the courts should examine the fairness factor.

commonly produce false confessions so as to avoid miscarriages of justice" (*Oickle*, 2000, para. 32). However, if the interrogation techniques or strategies employed by the police (in this case, undercover police officers who are not considered persons in authority) do not fall within the ambit of the rule, how then can Mr. Big scenarios be monitored so that they do not elicit false confessions and result miscarriages of justice?

In *Oickle* (2000), the Supreme Court of Canada remarked, "Voluntariness is the touchstone of the confessions rule" (para. 69). [90] This underlying principle is based on the notion that "involuntary confessions are more likely to be unreliable" (para. 32). A confession induced by a "fear of prejudice" or "hope of advantage" held out by persons in authority (persons who the accused believes are able to affect the course of the prosecution) is not only involuntary but is likely to have little indicia of reliability, and is generally inadmissible as evidence against an accused (*Ibrahim v. The King*, 1914, 609; *Oickle*, 2000, para. 15). Significantly, as stated elsewhere in this thesis, the requirement that admissions be voluntary applies only to statements made to persons in authority (Brockman & Rose, 2006, 222). Consequently, self-incriminating statements gleaned from unwitting suspects by undercover police officers who portray themselves as members of a criminal organization do not fall within the ambit of the common law confessions rule.

Mr. Justice De Villiers of the BC Provincial Court in *Copeland* (1995) questioned the logical basis for this state of the law asking, if the underlying principle of the confessions rule is that involuntary confessions are unreliable, and if such reasoning is valid, "how can it logically be said that confessions improperly extracted by persons not defined as 'persons in authority' are any more reliable than those extracted by persons in authority" (para. 21)? As Nowlin (2004) argues, surely the anticipation of professional

[90] According to Penney (2004), "jurists have long recognized, however, that voluntariness is an imperfect proxy for reliability (281).

advancement in a powerful and wealthy criminal organization falls within this framework, not to mention the assistance the organization is offering the target to circumvent an imminently devastating situation (conviction of a serious criminal offence). In addition, the target may fear reprisal from the criminal syndicate if they do not make the expected admissions.

Since the issue of voluntariness, at common law, applies only to statements made to persons in authority who the accused believes are acting as persons in authority, able to affect the course of the prosecution, a confession made to undercover police officers is admissible as evidence without the necessity of voluntariness. It then becomes the province of the trier of fact to assess the reliability, or truthfulness of the statement, and decide how much probative value to attribute to it.

Whereas the person in authority requirement is an integral part of the Canadian common law confessions rule, the problems associated with determining who is a person in authority do not exist in the United States because, as the Uniform Law Conference Report (1982) pointed out, the prosecution in the United States has to prove the voluntariness of all statements made by an accused person (cited in Brockman & Rose, 2006, 222). Despite the English Criminal Law Revision Committee's recommendation to adopt a rule much like the one that exists in the U.S., both the Uniform Law Conference of Canada (1982) and the Law Reform Commission of Canada (1984a; 1984b) were opposed to such sweeping changes and advocated that Canadian criminal law retain the persons in authority requirement (cited in Brockman & Rose, 2006, 222).

In *Hodgson* (1998), counsel for the accused asked the Supreme Court of Canada to either expand the scope of the common law confessions rule to include persons who are not persons in authority or to extend the scope of the definition of a person in

authority so that all involuntary confessions are subject to the exclusionary rule, regardless of the recipient (See *Carter*, 2001, para. 55).[91] Despite Justice Cory's recognition of the "very real possibility of a resulting miscarriage of justice and the fundamental unfairness of admitting statements coerced by the violence of private individuals", he remarked that such fundamental changes to the confessions rule "could bring about complex and unforeseeable consequences for the administration of justice" (*Hodgson*, 1998, para. 29). In short, the Court declined to eliminate the requirement for a person in authority threshold determination, stating that such sweeping changes to the law "is the sort of change which should be studied by Parliament and remedied by enactment" (*Hodgson*, 1998; also see *Grandinetti*, 2005, para. 35).[92]

As alluded to, criminal organizations can be coercive, and "are often held together with violence and that the trust that is often associated with criminal organizations is based on a fear of reprisal for anyone who betrays the criminal organization" (*United States of America v. Burns*, 1997, para. 4). Targets, by and large, argue that they provided undercover officers with inculpatory statements in order to placate members of the criminal organization they believe to be dangerous, to secure significant financial payouts, or perhaps both (*Carter*, 2001, para. 27; *Fischer*, 2005, para. 30; *Grandinetti*, 2003, para. 46; *Hart*, 2007, para. 63; *Holtam*, 2002, para. 18; *Lowe*, 2004, para. 233; *Skiffington*, 2004, para. 12; *United States of America v. Burns*,

[91] Similar arguments have been made in *Copeland*, (1995), *Forknall*, (2003), and *McCreery*, (1998).

[92] The Supreme Court of Canada has uniformly sidestepped this issue on numerous occasions, maintaining such fundamental changes to the law are a matter of legislative reform. See the cases of *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd*., (1997); *Copeland*, (1995); *Forknall*, (2003), *McCreery*, (1998); *Salituro*, (1991); *Watkins v. Olafson*, (1989); *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, (1997)

1997, para. 4; *Terrico*, 2005, para. 2).[93] However, since no clear or direct threats are made, a "Hodgson warning" in these circumstances is futile. C.L. Smith J.'s words in *Lowe* (2004), however, are representative of a warning the trial judge gave to the jury in these reasons for judgment: "Statements made in the course of an undercover operation must be viewed as inherently unreliable. It is dangerous to base a conviction upon such statements unless they are confirmed by independent evidence" (para. 370).

Indeed, to eliminate the person in authority requirement for the voluntary confessions rule would have far-reaching consequences for undercover police work, the Mr. Big strategy being no exception. Even though the accused would not subjectively perceive undercover police officers to be persons in authority, all statements stemming from an undercover operation would become subject to the confessions rule (*Hodgson*, 1998, para. 25). Thus, in the context of Mr. Big, this post-offence undercover operation would, in all probability, cease to exist as an investigative technique.

In any event, Penney (2004) posits that Parliamentary intervention is not warranted in the circumstances because judges have the discretion at common law to exclude evidence where the prejudicial effect of such evidence outweighs any probative value it may have (295).[94] While it has never been suggested that such discretion apply to confession evidence he suggests the Courts could use this power to exclude statements that do not fall within the ambit of the common law confessions rule (295).[95]

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[93] The words of Curtis J. in *Forknall* (2000) summarize the judiciary's view of threats and intimidation: "The words uttered by the police in the course of this undercover investigation were not spoken with the intent to intimidate and cause fear, but with the intent to convince the accused that the undercover operation really was a criminal operation; accordingly the threats were not uttered as threats" (para. 20).

[94] Moreover, section 715 of the *Criminal Code* provides the trial judge with a residual discretion to exclude statements where the risk of undue prejudice exceeds the evidence's probative value (*Hawkins*, 1996, para. 21).

[95] As Scott C.J.M. observed in *Unger* (1993a), even though the trial judge has the discretion to "exclude evidence where the prejudicial value exceeds its probative weight, the ordinary rule is still toward an inclusionary policy" (para. 64).

Penney (2004) intuitively argues, “This discretion should be exercised whenever there is a reasonable possibility that the trier of fact would five undue weight to a questionable confession” (295). Although well intentioned, the common law discretion to exclude impugned confessions is arguably not an adequate safeguard since some judges may not be sufficiently mindful of the growing phenomenon of false confession. Instead, Penney (2004) puts forward for consideration the notion that the confessions rule should prohibit interrogation techniques that “experience and study have shown apt to produce false confessions” (296).[96]

## A General Exclusionary Rule

Despite integrated safeguards the RCMP say “ensure” assertions obtained from targets are reliable, Nowlin (2004) opines that in addition to the fact that the Mr. Big undercover operations as a whole reflect poorly on the target’s character, the undercover elicitations are “of dubious reliability and have only the most tenuous probative value” (383). As such, he argues that the Canadian criminal courts should seriously consider adopting a general exclusionary rule with respect to confessions obtained by virtue of Mr. Big undercover operations (383).

Indeed, the manner in which these confessions are obtained calls into question their reliability, but there may be other independent evidence that tends to confirm it. Penney (2004), for example argues that undercover elicitation in custody is acceptable. That is, the jurisprudence set out in *Hebert* (1990) is too protective in that it prohibits undercover officers from eliciting admissions from detainees. Penney (2004) writes, “while unreliability and the possibility of wrongful conviction may be concerns in some cases of undercover elicitation, they by no means justify an absolute exclusionary rule”

[96] See White’s (1997) discussion concerning the prohibition of interrogation tactics that create a substantial risk of producing a false confession (139-140).

(325). He contends that it would be absurd, for example, to exclude an electronically recorded jail-house confession in which a suspect accurately reveals information that was previously unknown to police, such as the location of a previously undiscovered murder weapon (325). In line with this research, let us consider the case of *Black* (2007). Ronda Petra Black was charged with the first-degree murder of her husband. Almost four years after his death, the RCMP initiated an undercover operation against the accused, which resulted in a confession to Mr. Big (para. 135). Although Black argued her confession was fabricated, Humphries J. noted, "it must be kept in mind that the police had no information at all on what had happened to Mr. Black until Ms. Black told them…the police in charge of the investigation followed up all of Ms. Black's information and indeed corroborated many parts of it" (*Black*, 2007, para. 630). A general exclusionary rule would mean that anything Ronda Black communicated to undercover police officers would be ruled inadmissible.

Much of the discourse concerning the adoption of a general exclusionary rule related to the elicitation of a confession in undercover operations has come from legal commentators. One other important factor to consider is the potentially morally troubling costs of this interrogation technique, and whether it exceeds professional and ethical boundaries. As stated earlier, undercover operatives use public funds to engage in, or stage criminal activities. In addition, they subsidize numerous costs including transportation (business-class air travel), quartering themselves and targets in some of Canada's finest hotels, and dining at some of this country's most lavish restaurants, and, depending on the target's lifestyle choices, they might treat targets to more mundane activities such as exotic dancers (Baron, 2008a, A.4). Do we want police officers using public funds to engage in, or staged criminal activities to solve crimes?

## Caveats That Should Be Borne In Mind

Wrongful convictions are an unfortunate but very real consequence of the Canadian criminal justice system. According to Ramsey & Frank (2007), wrongful convictions violate norms of individual justice, mean that the real perpetrator has not been brought to justice, and undermine public confidence in the administration of justice (437-8). For these reasons, Ramsey & Frank (2007) write that wrongful convictions "can damage the symbolic status of the criminal justice process…This damage ultimately places a burden on the integrity, prestige, reputation, credibility, and effectiveness of the entire criminal justice process" (438). Thus, it is imperative that we work to implement policies that minimize the likelihood of eliciting false confessional statements from the innocent in order to prevent miscarriages of justice that may ensue, not contribute to the growing problem, even if it means eliminating the Mr. Big interrogation technique. An unfortunate corollary in the preservation of the integrity of criminal justice system is the reality of having the perpetrator walk away. In *Mentuck* (2000b), Mr. Justice MacInnes expressed how tragic the death of 14 year-old Amanda Cook was, saying, "For her parents, family and friends, a conviction would end the resurrection of this sorrowful event brought about by trials and re-trials and would undoubtedly permit them to bring or begin to bring some closure to it" (para. 4). He did, nonetheless, acknowledge that equally tragic to the death of the victim in this case, "would be the wrongful conviction of one charged with her murder" (para. 5).

There have not yet been any confirmed miscarriages of justice resulting from a Mr. Big sting operation. The UBC Law Innocence Project, an initiative of the University of British Columbia Faculty of Law , however, is currently conducting a review of 23 homicide convictions, an unknown number of which are convictions resulting from Mr. Big investigations (Stueck, 2009, 34). Most recently, the federal Minister of Justice and

Attorney General of Canada, Rob Nicholson, has ordered a new trial for Kyle Wayne Unger, citing concerns that Unger may have been wrongfully convicted. In a written statement, Nicholson stated, “I am satisfied there is a reasonable basis to conclude that a miscarriage of justice likely occurred in Mr. Unger’s 1992 conviction” (Hutchinson, 2009, A.1). A review of that case hereunder shows that a fairly compelling body of evidence substantiates those concerns.

On the evening of 23 June 1990, Kyle Wayne Unger, then 19 years of age, attended a rock music festival at a ski resort near Roseisle, Manitoba. The following day, the mutilated body of 16 year-old high school student, Brigitte Grenier, was discovered in a creek in a densely wooded part of the resort (*Unger*, 1993a, para. 1). The co-accused, Timothy Houlahan, then aged 17, also attended the festival, however, both accused attended the festival separately with their respective friends. Subsequent to a massive police investigation, both Unger and Houlahan were charged with the first-degree murder of Brigitte Grenier.[97] Subsequent to a preliminary inquiry, the charges against Unger were stayed due to a lack of evidence. The RCMP then decided to launch a Mr. Big undercover operation with Unger as the target. Over the course of 12 days (not lengthy in terms of a Mr. Big operation), undercover operatives would initiate contact with, and befriend Kyle Unger, giving him the impression that he could become a member of the criminal organization (para. 21). He confessed to being criminally involved in the death of Brigitte Grenier.

The prosecution’s case hinged on testimony from a jailhouse informant claiming that Unger confessed to killing Brigitte Grenier, his confession to undercover police officers, and hair fibre evidence consistent with Unger found on the sweatshirt worn by

[97] At the time of the Brigitte Genier’s death, Timothy Houlahan was 17 years of age. Although an adolescent, as defined by the *Youth Criminal Justice Act*, he was transferred to adult court, a decision that was upheld on appeal to both the Court of Queen's Bench and the Manitoba Court of Appeal (*Unger*, 1993a, para. 15).

the deceased (*Unger*, 2005, para. 1). Unger and Houlahan were convicted by a jury and sentenced to life imprisonment without eligibility for parole for twenty-five years.

While the Manitoba Court of Appeal agreed to hear Unger's case, the Court ultimately dismissed his appeal from conviction.[98] Unger's application for leave to appeal to the Supreme Court of Canada was dismissed without reasons (*Unger*, 1993b). The story, however, does not end here. On the contrary, a break in Kyle Wayne Unger's cases would come almost ten years later.

Prior to the development of forensic DNA testing in Canada in the 1990s, microscopic hair comparison was a prevalent technique used to assess forensic evidence. However, advancements in DNA technology, and increasingly sophisticated forms of testing have been shown to be more reliable than antecedent procedures in excluding suspects as sources of hair samples (Manitoba Justice, 2004, 3). On 23 April 2003, the Deputy Minister of Justice, and Deputy Attorney General for the province of Manitoba, Bruce MacFarlane, announced the establishment of the Forensic Evidence Review Committee to review homicide cases "from the previous fifteen (15) years in Manitoba in which hair comparison evidence was relied upon to secure a conviction" (Manitoba Justice, 2004, 3). Of the initial 175 cases reviewed, two satisfied the criteria for revaluation, one of them being the Kyle Unger case.[99] The forensic evidence review committee decided to perform mitochondrial DNA (mtDNA) analysis on the microscopic hair comparison evidence originally tendered at trial, as well as samples provided by the accused, to determine whether the accused could be excluded as a source of the DNA from the exhibits. An examination of the hair and blood samples of Unger showed,

[98] Houlahan's first-degree murder conviction, on the other hand, was overturned on appeal. The cumulative effect of several errors at trial provided "the basis for a determination that there was a miscarriage of justice" (para. 173). However, Houlahan committed suicide in 1994 while awaiting a new trial (*Unger*, 2005, para. 3).

[99] The other case is that of Robert Stewart Sanderson (*Sanderson*, 1999a).

> thirteen (13) differences between the mtDNA profile for six (6) of the suspect hairs (Exhibit # 1001 and #'s 1001-1105) and that of Unger and fifteen (15) differences between the remaining hair (Exhibit # 1106) and Unger. The hairs (Exhibits # 1001 and #'s 1101-1106) are not from Unger or a maternally related individual (e.g. brother or uncle) (Manitoba Justice, 2004, p. 20).

Having exhausted all avenues of appeal, counsel for Unger, under the conviction review provisions of the *Criminal Code* (sections 696.1-696.6), applied to the Minister of Justice to review his conviction of first-degree murder. In November 2005, Beard J., of the Manitoba Court of Queen's bench, released Unger from incarceration pending a ministerial review of his conviction for first-degree murder (*Unger*, 2005). Madam Justice Beard found several inconsistencies in Unger's confession to undercover police officers, which brings into question the trustworthiness, or reliability of his assertions.[100] Kyle Unger not only disclosed specific descriptions that were inconsistent with the facts of the case, he made assertions that were patently false.[101] As Beard J. pointed out, "The difficulty with these details is that they were not true" (para. 19). In addition, there was evidence at trial from several of Unger's friends and his mother that Unger was a "bullshitter" and had a propensity to tell stories (para. 21).

Significantly, Unger's confession was no longer supported by the two other pieces of evidence; the microscopic hair analysis excluded Unger as a suspect, and the confession to the jailhouse informant was ultimately discredited and withdrawn by the Crown (Makin, 2009, A.9). As such, "Given the frailties in and around the making of the

[100] The Manitoba Court of Appeal observed that, in his discussions with undercover police officers about the murder of Brigitte Grenier, Unger "got a number of the details of the murder wrong, [although] the essential features of the murder as he described them continued to be consistent with the physical evidence" (*Unger*, 1993a, para. 60). Despite the fact that some specific descriptions were inconsistent, and at times wrong, Scott C.J.M. was of the view that this was "not significant in the totality of his confessions" (para. 60). At the time, other compelling evidence corroborated the confession at that time. If you recall, however, Leo and Ofshe (1998a) argue that mundane details related to the criminal event that are of great worth in determining guilt or innocence.

[101] See *Unger*, 2005, para. 18.

confession, the removal of the supporting evidence has to be a new matter related to the reliability of the confession that was not considered by the jury and is clearly significant" (para. 23). Given that Unger's confession was fraught with inconsistencies and outright fiction, Beard J. agreed with the Criminal Conviction Review Group of the Department of Justice's recommendations that false confessions expert Dr. Gisli Gudjonsson review Unger's confession (*Unger*, 2005, paras. 6, 48).

After serving 13 years in prison for the murder of Brigitte Grenier, Madam Justice Beard ordered the release of Kyle Unger pending ministerial review, citing "very serious concerns that the applicant may have been wrongfully convicted and, apart from this conviction, there is no reason to refuse to release Mr. Unger" (para. 51).

Most recently, on 11 March 2009, federal Minister of Justice and Attorney General of Canada, Rob Nicholson, ordered a new trial for Kyle Unger. His decision came after a review of the "Investigation Report" and advice of the Department's Criminal Conviction Review Group;[102] the submissions of Mr. Unger's counsel and of the Attorney General of Manitoba; and the recommendations of Mr. Bernard Grenier, the Minister's Special Advisor on the criminal conviction review process (Department of Justice, 2009). The evidence must have been compelling because this was only the fourth time that a justice minister has ordered a new trial and not referred the matter to a provincial appellate court for hearing (Makin, 2009, A.9). James Lockyer, a lawyer with AIDWYC, said, "It's hard not to see it as a comment by Mr. Nicholson that this case, as presented to him, is so overwhelming that it wasn't necessary, desirable or appropriate for a court of appeal to look at it" (Makin, 2009, A.9).

[102] Hutchinson (2009) indicates that the federal Justice Department's Criminal Conviction Review Group relied on a report from false confessions expert Dr. Gisli Gudjonsson (A.1).

Lockyer speculates that Unger was a victim of tunnel vision, stating, “the police formed a theory before they had evidence of it, and then made the facts fit into their theory”. He went on to say that they “formed a theory early on that two people must have committed this crime, for no reason, but that was their theory. So they managed to find two people who committed it, when only one really did” (Giroday, 2009, A.4).[103] Manitoba’s deputy minister of justice, Jeffrey Schnoor, said Crown counsel would meet with RCMP over the coming weeks to review the Unger case file. He also indicated that the decision to retry Kyle Unger “will be based on whether the Crown has a reasonable likelihood of conviction and whether it’s in the public interest” (Giroday, 2009, A.4). A trial date has yet to be specified.

The conclusion of the Unger case could have potentially significant consequences that reverberate throughout the criminal justice system. If Kyle Wayne Unger is exonerated, it could mean the end of, or at least a serious reassessment of, this undercover policing operation. Whether there is a permanent place for Mr. Big as a legitimate technique for investigating unsolved murder investigations in Canada remains to be seen.

Since the Unger case has been repeatedly cited by the Alberta, British Columbia, and Manitoba Courts of Appeal as authority for numerous legal issues in the context of this undercover investigational technique, it is conceivably one of, if not, the first successful Mr. Big operation(s) that has come before the courts. That being the case, the potential for appeals and further applications for ministerial review (frivolous or not)

[103] In addition to evidence collected at the murder scene excluding Unger as a suspect, witnesses testified seeing Unger hanging around a campfire, and that “he did not have any mud or dirt on his clothing, or scratches or bruises to his face” (Unger, 1993a, para. 6). Houlahan, on the other hand, was seen emerging from the densely wooded part of the resort covered in mud, had scratches on his face and blood on his chin (para. 7). Moreover, a forensic orthodontologist testified that the bite marks found on the victim's breasts and arm could not have been made by Unger (para. 9). The co-accused, Houlahan, refused to provide police with teeth impressions (para. 128).

could overburden an already strained justice system. How so? Bear in mind that Unger's confession is no longer supported by the two other pieces of evidence, namely the microscopic hair analysis and the confession to the jailhouse informant. Beard J. noted in her ruling that:

> The only remaining evidence is the accused's confession to the undercover police, which is fraught with serious weaknesses and which the investigators have suggested should be assessed by an expert in false confessions. If that report concludes that the confession was false, there will be no evidence against Mr. Unger (*Unger*, 2005, para. 48).

Thus, the Canadian criminal courts can expect appeals in all cases where disclosures made by the accused to undercover police officers as a result of the undercover operation were essential to the Crown's case.

As alluded to earlier, research has shown that false confessions continue to occur with regular and disconcerting frequency, and that interrogation-induced false confessions are becoming one of the more salient causes of erroneous convictions. In any case, as Gohara (2005) opines, "The demonstrated correlation between police deception during interrogation and false confessions leading to wrongful convictions should inspire timely judicial and legislative reform" (840). More specifically, Canadian criminal courts and legislators should seize this opportunity to reassess the laws governing admissions and confessions before the number of wrongful convictions attributed to this undercover technique emerge from obscurity. The central issue to the study of the phenomenon of false confession is no longer whether contemporary interrogation techniques have a propensity to elicit false confessions from innocent suspects. Rather, the trajectory of future research should focus on methods of prevention (Leo & Ofshe, 1998a, 492). The input of false confessions experts and social science researchers alike can unquestionably contribute a great deal to this dialogue. Further inaction or delay will only perpetuate an already overburdened criminal justice

system. We need to need to implement procedures that minimize the rate of false confessions, not contribute to the growing problem.

While undercover policing techniques provide the police wider discretionary and procedural latitude than conventional approaches (Pogrebin & Poole, 1993, 384), which enables them to tackle increased and more sophisticated types of crime, it undoubtedly challenges democratic ideals of civil liberties, lowers adherence to procedural due process, and calls into question police accountability (Marx, 1988, 15; Pogrebin & Poole, 1993, 384). One of the greater ironies of undercover is that the intense institutional, public and media pressures to track down and prosecute some of this country's worst malefactors often compel the police to engage in increasingly deceptive law enforcement tactics (Anderson & Anderson, 1998, 13; Leo, 1992, 53). A matter of great import is balancing the competing imperatives of crime control and due process without compromising the rights of the accused and the integrity of the administration of justice (Leo, 1992, 36). Suffice it to say that while undercover tactics, like the Mr. Big strategy, are seen as a necessary evil, Marx (1988) asserts "the challenge is to prevent them from becoming an intolerable one" (233).

If we choose to willingly coexist with controversial undercover policing tactics to control crime, we must also come to grips with the many intended, as well as unintended, consequences that accompany them. Is it possible that we have become overconfident in, and insensitive to, the dangers that "literally and figuratively lurk beneath the surface" of undercover operations (Marx, 1988, 206)? Have we adopted an uncritical attitude and become complacent with their use? Or are we aware of the dangers and accept them as a cost for the protection of society? In the words of Marx (1988), we must be cautious "not to adopt a cure that is worse than the disease. The morality of the means is as important as that of the ends" (222).

According to Ofshe and Leo (1997b), false confessions by innocent persons are still a regular occurrence, “and will likely continue until police and other criminal justice officials develop a better understanding of the dangers of contemporary interrogation practices and establish safeguards to prevent their misuse” (983). Given the recent controversy surrounding the Mr. Big investigative technique, such a concern is imperative now more than ever. While somewhat equivocal, the results suggest that despite integrated safeguards the RCMP say ensure assertions obtained from targets are reliable, we must ask ourselves, in the face of fairly compelling evidence, whether we should afford the police the opportunity to employ clandestine operational tactics that could potentially elicit unreliable confessions.

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# LIST OF CASES

*Vetrovec v. the Queen*, [1982] 1 S.C.R. 811

*R. v. W.(D.)*, [1991] 1 S.C.R. 742

*Sherman v. United States*, 356 US 369 (1958)

*Watkins v. Olafson*, [1989] 2 S.C.R. 750

*Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925

# LEGISLATION

Canadian Charter of Rights and Freedoms Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 1

Criminal Code (R.S., 1985, c. C-46)

Mutual Legal Assistance in Criminal Matters Act (1985, c. 30 (4th Supp.))

Youth Criminal Justice Act (2002, c. 1)

# APPENDICES

## Appendix A: Coding Sheet

**Coding Sheet for "Mr. Big" Undercover operation cases Case Number_____**

**Background of accused**

**Q. 1. Sex of Accused**
1. male
2. female

**Q. 2. Age of accused ____**
1. adult
2. youth

**Background of Case**

**Q. 3. Geographic location of offence/hearing**
1. British Columbia 2. Alberta 3. Saskatchewan 4. Manitoba 5. Ontario 6. Quebec 7. New Brunswick 8. Nova Scotia 9. P.E.I. 10. Newfoundland 11. Northwest Territories
12. Yukon

**Q. 5. Trial by**
1. Judge and jury
2. Judge alone

**Q. 6. Name of judge(s) presiding over case _____**

**Q. 7. Type of criminal offence committed _____**

**Q. 8. Judgment**
1. Guilty
2. Not Guilty

**Undercover operation**

**Q. 9. What year "Mr. Big" Carried commenced _____ (yyyy)**

**Q. 10. Why undercover operation was commenced**
1. Traditional techniques proved ineffective and unsuccessful
2. To strengthen case where evidence already exists
3. Other
4. Not stated

**Q. 11. Time lapse between commission of offence and commencement of undercover operation (in months) _____**

**Q. 12. How did police approach suspect? _____**

**Type of method was used for securing the confession**

**Q. 13. Alibi fabrication**
1. yes
2. no
3. not stated

**Q. 14. Fall Guy**
1. yes
2. no
3. not stated

**Q. 15. Destruction of evidence**
1. yes
2. no
3. not stated

**Q. 16. Frame someone else**
1. yes
2. no
3. not stated

**Q. 17. Boss has inside contacts, criminal justice officials**
1. yes
2. no
3. not stated

**Q. 18. Prove Loyalty to organization (information to hold over target)**
1. yes
2. no
3. not stated

**Q. 19. Police produce false document**
1. yes
2. no
3. not stated

**Q. 20. Withdrawing role in organization because confession has holes through it (suspect lying)**
1. yes
2. no
3. not stated

**Q. 21. Boss could protect accused from being prosecuted for the crime and would "make it go away"**
1. yes
2. no
3. not stated

**Q. 22. Defendant's mental health an issue**
1. Yes
2. No
3. Not stated

**Q. 23. Did the Court decide that the undercover tactic shocked the conscience of the community?**
1. yes
2. no
3. not stated

**Q. 24. Confessions expert evidence allowed at trial**
1. yes
2. no
3. not stated

**Q. 25. If yes, who succeeded?**

1. Crown
2. Defence

**Q. 26. Did the trier of fact hear character evidence of past crimes committed by the accused?**

1. yes
2. no
3. not stated

**Q. 27. Did the trier of fact hear character evidence of the accused offering to commit crimes for the crime gang?**

1. Yes
2. No
3. Not stated

**Q. 28. Did the trier of fact hear character evidence of the accused committing crimes as a part of the "Mr. Big" operation?**

1. Yes
2. No
3. Not stated

**Q. 29. Was a publication ban sought?**

1. yes
2. no
3. not stated

**Q. 30. If yes, the names and identities of the undercover police officers in the investigation of the accused, including any likeness of the officers, the appearance of their attire and their physical descriptions;**

1. Yes
2. No
3. Not stated
4. Not applicable

**Q. 31. The conversations of the undercover operators in the investigation of the accused to the extent that they disclose or tend to disclose the matters referred to in sub-paragraphs (1) and (2) herein;**

1. Yes
2. No
3. Not stated
4. Not applicable

**Q. 32. The specific undercover operation scenarios used by the undercover police officers in the investigation of this matter.**

1. Yes
2. No
3. Not stated
4. Not applicable

**Q. 33. Publication ban was issued but no details were disclosed**

1. yes
2. no
3. not stated
4. not applicable

**Q. 34. Outcome of first appeal**

1. For the Crown
2. For the accused
3. New Trial ordered
4. Not applicable

**Q. 35. Outcome of Second Appeal**

1. For the Crown
2. For the accused
3. New Trial ordered
4. Application for leave to appeal dismissed
5. Not applicable

**Q. 36. Was any videotape of undercover operation shown to judge and/or jury?**

1. yes
2. no
3. not stated

**Q. 37. Was there**

1. video
2. audio
3. both
4. not stated
5. not applicable

**Q. 38. In instances where videotaping was not conducive, did police record conversations of scenarios (audio)?**

1. yes
2. no
3. not stated

**Q. 39. Did police intercept private communications (phone, etc.) of accused for evidence?**

1. yes
2. no
3. not stated

**Q. 40. Judges' position on the legitimacy of undercover operation**

1. approve
2. disapprove
3. indeterminate
4. not stated

**Q. 41. Judges' comments on the legitimacy of undercover operation _____**

**Q. 42. Is the target, or does he/she suffer from**

1. Mental illness
2. Mentally Challenged
3. Adolescent
4. Highly suggestive personality type
5. None
6. Not stated
7. Substance abuse

**Q. 43. Did the suspect disclose information that was unknown to police?**

1. yes
2. no
3. not stated

**Q. 44. Did the suspect give holdback evidence?**

1. yes
2. no
3. not stated

**Q. 45. Was there any other corroborating evidence pointing to the guilt of the accused?**

1. yes
2. no
3. not stated

**Q. 46. Did the suspect give any false information about the crime?**

1. yes
2. no
3. not stated

**Q. 47. Did the suspect give any false information about previous crimes to look big?**

1. yes
2. no
3. not stated

**Q. 48. Was the suspect told he/she could walk away at anytime?**

1. yes
2. no
3. not stated

**Q. 49. Did the suspect claim he/she did not have a choice as to whether he/she could walk?**

1. yes
2. no
3. not stated

**Q. 50. Did the accused later retract the confession statement?**

1. Yes
2. No

**Q. 51. Was a *voir dire* held to determine admissibility of "Mr. Big" scenario?**

1. Yes
2. No
3. Unknown

**Inducements offered to accused**

**Q. 52. cigarettes**

1. yes
2. no
3. not stated

**Q. 53. Alcohol**

1. yes
2. no
3. not stated

**Q. 54. Was money given to the accused?**

1. yes
2. no
3. not stated

**Q. 55. How much _____**

**Q. 56. Was money promised to the accused?**

1. yes
2. no
3. not stated

**Q. 57. How much _____**

**Q. 58. Offer of future employment, permanent role in organization**

1. yes
2. no
3. not stated

**Q. 59. Was the accused exposed to violence in a scenario?**

1. yes
2. no
3. not stated

**Q. 60. Was there any threat of violence or harm directed toward the target?**

1. yes, implicit
2. yes, explicit
3. no
4. indeterminate
5. not stated

## Appendix B: List of Cases

*R. v. Aubee*, [2002] S.J. No. 410 (Q.B.); [2006] S.J. No. 620 (Q.B.)

*R. v. Bicknell*, [2003] B.C.J. No. 2312 (S.C.)

*R. v. Black*, [2007] B.C.J. No. 1644 (S.C.)

*R. v. Bonisteel*, [2008] B.C.J. No. 1705 (C.A.)

*R. v. Bridges*, [2005a] M.J. No. 232 (Q.B.); [2005b] M.J. No. 536 (Q.B.); [2006] M.J. No. 428 (C.A.)

*United States of America v. Burns*, [1997] B.C.J. No. 1554 (C.A.); [2001] 1 S.C.R. 283

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