Criminal Law Quarterly, 2009, Vol. 55 (3), 348-404

Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the 'Mr. Big' Strategy

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Abstract

For the last 20 years or so Canadian police forces have been employing a novel investigative technique referred to as 'Mr. Big'. The tactic is designed to elicit inculpatory admissions from a suspect in murder cases where the police may lack sufficient evidence to link the suspect to the homicide. To induce confessions, the police pose as members of a fictitious criminal organization that the suspect is inveigled to join. The suspect is befriended over the course of several months and engaged in increasingly serious criminal activities for which he is lucratively compensated. Ultimately he is asked to "come clean" to the big boss about any past transgressions in order to preserve the safety and security of the criminal gang. The ensuing "confession" is videotaped and constitutes the evidence that grounds subsequent charges. This paper raises legal and psychological concerns about the risks of false confessions that can arise from the procedure.

Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the "Mr. Big" Strategy

Timothy E. Moore,[*] Peter Copeland[**] and Regina A. Schuller[***]

1. Introduction

Undercover police work has been used extensively over the past few decades to infiltrate criminal organizations and dismantle drug rings.[1] The purpose of undercover operations is to obtain evidence of a target's involvement in a crime. The recent increase in such operations indicates an increasing acceptance of state-sponsored deception as a form of social control. Because of the secrecy surrounding the tactics used during such operations, and the need to tailor each operation to the specific case, information pertinent to the formal training of undercover officers (*i.e.*, police manuals) and the manner in which suspects are targeted, remains, unsurprisingly, elusive. This relative obscurity makes undercover work vulnerable to abuses of power and impedes its scientific study.

Deception and the abuse of trust in personal relationships are becoming as common as traditional wiretapping and other means of privacy infringement. According to Ross,[2] the concept of entrapment has shaped the debate about the legality of undercover operations on both sides of the

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*** Department of Psychology Faculty of Health, York University. We thank the following people for helpful comments on previous drafts of this paper: James Alcock, Phillip Campbell, Karina Royer Gagnier, Justice Melvyn Green, David Paciocco, Don Stuart. Justice Green rightly eschews any responsibility for the final product.

1. G.T. Marx, "Who Really Gets Stung? Some Issues Raised by the New Police Undercover Work" (1982), 28 Crime & Delinquency 165.
2. J.E. Ross, "Undercover Policing and the shifting terms of scholarly debate: The United States and Europe in Counterpoint" (2008), 4 Annual Review of Law and Social Science 239.

Atlantic. In France, for example, entrapment will automatically trigger a dismissal of charges, whereas in the United States, the acceptability of the police inducement must be decided at trial. European courts view infiltration of suspects' lives by undercover operatives as an infringement of privacy and a problematic use of deception, whereas North American courts are more forbearing of such tactics.

This article addresses the "Mr. Big" procedure — an undercover operation that differs fundamentally from other types of undercover schemes. While it is not unusual for the police to attempt to obtain incriminating evidence by infiltrating a criminal organization, in the Mr. Big situation the police *create* the criminal organization and devote considerable time, money and energy to inveigling the target into joining their group. Undercover police officers posing as members of the fictitious criminal organization develop a relationship with the target and slowly involve the suspect in staged illegal activities on behalf of the organization. Various ruses and threats are used to show the target the benefits of joining the gang and the potential consequences of falling out of favour. The scheme usually culminates in an encounter with "Mr. Big", an undercover operative posing as a senior member of the organization, who may employ a range of inducements in an attempt to elicit a confession to the specific offence being investigated (typically murder).

The degree of control exercised by the police over the target is considerable. The tactics are invasive and persistent, usually lasting for several months. In one instance, the sting involved 50 operatives. Complete records of what transpired are not always available. While some of the orchestrated scenarios are electronically recorded — especially the confession that the jury will see and hear — much else is reduced to a retrospective narrative recorded by the operatives hours or days after the events being described.

The now-prevalent use of the Mr. Big technique in Canada has its roots in British Columbia in the early 1990s.[3] It is perhaps not coincidental that resort to this technique began

3. Although its modern incarnation appears to have started in the 1990s, an early example of a similar technique is described in *R. v. Todd* (1901), 4 C.C.C. 514 (Man. C.A.).

around the time of the Supreme Court of Canada's decisions in *R. v. Hebert*[4] and *R. v. Broyles*,[5] which set clear limits on the use of undercover investigative techniques against persons in custody.[6] While the police power to elicit confessions through post-arrest undercover techniques has been circumscribed, Mr. Big investigations have multiplied. It has been reported that approximately 180 Mr. Big investigations were conducted in British Columbia between 1997 and 2004.[7] Since its introduction in British Columbia, the technique has spread to other provinces.[8]

It is not disputed that the Mr. Big technique may produce probative evidence of a suspect's guilt. For example, where a confession leads to the discovery of new evidence, its probative value will be significantly enhanced.[9] In one case, after apparently being rattled during the early stages of a Mr. Big investigation, the suspect spontaneously attended a police station, voluntarily confessed and subsequently pled guilty to a 20-year-old homicide.[10] However, in light of the invasiveness of the technique, its inherent coercive nature and the strong inducements held out to elicit confessions, there is a real concern that the technique may cause innocent people to falsely confess, giving rise to a risk of wrongful convictions.[11] The fictional circumstances surrounding the confession, which

4. [1990] 2 S.C.R. 151, 57 C.C.C. (3d) 1, 77 C.R. (3d) 145.
5. [1991] 3 S.C.R. 595, 68 C.C.C. (3d) 308, 9 C.R. (4th) 1.
6. R.C.M.P. Sgt. Al Haslett has claimed to have helped develop the technique, stating: "I was just thinking outside the box, trying to see how far we could go." See Brian Hutchinson "RCMP turns to 'Mr. Big' to nab criminals: Shootings, assaults staged in elaborate stings", *National Post* (December 18, 2004), p. RB1 (Factiva). As Hutchinson notes, "They go further than you might imagine."
7. *Ibid.*
8. *R. v. Unger* (1993), 83 C.C.C. (3d) 228 , 41 W.A.C. 284, 85 Man. R. (2d) 284 (C.A.); *R. v. Osmar*, [2007] O.J. No. 244 (QL), 217 C.C.C. (3d) 174, 44 C.R. (6th) 276 (C.A.), leave to appeal to S.C.C. refused 218 C.C.C. (3d) vi; *R. v. H.*, [2007] NLTD 74.
9. See *R. v. Copeland* (1999), 214 W.A.C. 264, 141 C.C.C. (3d) 559 at paras. 2-3 (B.C.C.A.), where the accused, after confessing, led the undercover operatives to the body, which had not previously been discovered.
10. *R. v. Ethier*, [2004] B.C.J. No. 755 (QL), 2004 BCSC 532 at paras. 11-12 (S.C.).
11. We are not aware, however, of any proven case of a wrongful conviction involving a Mr. Big confession, but see the postscript at the end of this article.

have the effect of minimizing or eliminating the perceived risk of negative consequences to the target from claiming responsibility for the offence, may influence an individual's decision to falsely confess.

Concerns with respect to false confessions arise in part by analogy to the phenomenon of false confessions in the interrogation context.[12] Although it is not clear that the social science on police interrogations can be simply transferred to the context of Mr. Big investigations, forensic researchers are quite capable of explaining how the manipulation of motives and inducements develops in a Mr. Big operation. The risk of wrongful convictions due to false confessions in the latter context may be particularly pronounced in cases where there is little or no evidence to support the confession and where the facts of the confession do not fit the known circumstances surrounding the offence.

2. The "Mr. Big" Technique

The "Mr. Big" stings may be implemented in a variety of ways;[13] however, they usually have a common design. The suspect is surreptitiously observed for some time in order for the operatives to become familiar with his or her habits. In the early stages, an undercover operative will attempt to cultivate a relationship with the suspect; the two start talking and discover that they have something in common (*e.g.*, attended the same school or addiction centre, worked at the same place). A "friendship" develops over weeks and months. Together with other undercover officers posing as members of the

12. See S. Drizin and R. Leo, "The Problem of False Confessions in the Post-DNA World" (2004), 82 N.C.L. Rev. 891, in which 125 cases of "proven false confessions" were documented and analyzed. As well, in *R. v. Oickle*, [2000] 2 S.C.R. 3, 147 C.C.C. (3d) 321, 36 C.R. (5th) 129, the Supreme Court of Canada adverted to the studies of false confessions in considering the proper application of the confessions rule. As well, see R. Conti, "The Psychology of False Confessions" (1999), 2 J.C.A.A.W.P. 14; R. Leo and R. Ofshe, "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation" (1998), 88 J. Crim. L. & Criminology 429; R. Ofshe and R. Leo, "The Decision to Confess Falsely: Rational Choice and Irrational Action" (1997), 74 Denv. U. L. Rev. 979.
13. See *Osmar*, *supra*, footnote 8, at para. 1.

organization, the operative will provide the target with entertainment, companionship, a listening ear, gifts, meals and eventually employment. It is common for the suspect to receive substantial compensation for relatively minor work and to have the prospect of greater remuneration held out if he continues working with the organization.[14] Targets are often unemployed or of low socio-economic status and jump at the opportunity to be remunerated for questionable activities (*e.g.*, being a "lookout", delivering suspicious packages, unloading shipments, counting large sums of money, etc.) staged by the undercover officers and the "criminal organization" to which they ostensibly belong. As the scenarios progress, the undercover operatives may pressure the suspect to prove his loyalty by revealing criminal acts that he or she has committed. The importance of trust and honesty within the organization is emphasized to the suspect.[15]

In the later stages of the technique, the suspect is introduced to "Mr. Big" and the effort to elicit a confession is intensified. In some cases, the undercover operatives will suggest that the organization has received information from a corrupt person within the police force foretelling of a police investigation of the suspect. The supposed impending investigation will be presented as a potential problem for the organization and will be used to attempt to extract details from the suspect.[16] It may be suggested to the suspect that the organization's mole within the police force can manipulate evidence in an effort to protect the suspect.[17] Mr. Big may suggest that the suspect's arrest is imminent and the strength of the police evidence will be emphasized.[18] Mr. Big may also suggest that the organization can arrange for a person with a terminal illness to take responsibility for the offence; however, to do so, the suspect must give accurate details of the offence in order that the surrogate can tell a convincing story to the authorities.[19] In at

14. See *R. v. Mentuck*, [2000] M.J. No. 447 (QL), 2000 MBQB 155 at paras. 76 and 78 (Q.B.).
15. *Ibid.*, at para. 77.
16. *Ibid.*, at para. 81.
17. See *R. v. Grandinetti*, [2005] 1 S.C.R. 27 at paras. 9 and 10, 191 C.C.C. (3d) 449, 25 C.R. (6th) 1.
18. See *R. v. Fliss* (2000), 145 C.C.C. (3d) 353 at para. 74, 227 W.A.C. 89 (C.A.), affd [2002] 1 S.C.R. 535, 161 C.C.C. (3d) 225, 49 C.R. (5th) 395.

least one case, as a final stage of the technique, the undercover operatives went so far as to stage a homicide and involved the suspect in a discussion about how to cover it up. The suspect was subsequently subjected to "extreme pressure" and "clear threats" by the undercover operatives, who insisted that because he had something over the gang, they needed to have something over him.[20] Regardless of the specific tactics used in any individual case, in the end the decisive conversation with Mr. Big is videotaped and, assuming a confession is obtained, the target is arrested. More often than not, the concluding exchange with Mr. Big is shown to the jury.

In many Mr. Big prosecutions, apart from the confession, the police do not have significant independent evidence implicating the suspect in the crime.[21] It is not uncommon for the defendant to take the position that his confession to the undercover operatives was not true but was instead the product of an attempt to impress the operatives, to gain the advantages offered by the organization, or to avoid an impending (wrongful) arrest predicted by Mr. Big.[22]

The "Mr. Big" technique has not been adopted in the United States or the United Kingdom but it enjoys widespread use in Canada and occasional use in Australia. Unlike the "*Reid* technique"[23] — an influential and widely used police interrogation procedure — there are no manuals or guidebooks in the public domain that spell out the specific tactics employed in a Mr. Big sting. Consequently, the makeup and architecture of the Mr. Big operation can only be gleaned by a review of those cases where a trial court's rulings or appeal court's reasons for judgment describe the police investigative strategies.[24]

19. *Ibid.* As well, see *Dix v. Canada (Attorney General)*, [2003] 1 W.W.R. 436 at para. 124, 7 Alta. L.R. (4th) 205, 315 A.R. 1 (Q.B.).
20. *Dix ibid.*, at paras. 126 to 131. Despite the intense nature of the Mr. Big scenario in this case, however, Dix maintained his innocence.
21. *Fliss*, *supra*, footnote 18, at para. 6; *Osmar*, *supra*, footnote 8, at paras 1-2.
22. *Fliss*, *ibid.*
23. F.E. Inbau, J.E. Reid, J.P. Buckley and B.C. Jayne, *Criminal Interrogation and Confessions*, 4th ed. (Gaithersberg, MD: Aspen., 2001).
24. *R. v. Black*, [2007] B.C.J. No. 1644 (QL) (S.C.); *R. v. S. (C.K.R.)* ; *R. v. Ethier*, *supra*, footnote 10; *R. v. Fischer*, [2005] B.C.J. No. 1042 (QL), 350 W.A.C. 199, 197 C.C.C. (3d) 136 (C.A.), leave to appeal to S.C.C. refused [2005] 3 S.C.R. vi; *R. v. Franz*, [2000] B.C.J. No. 1062 (QL) (S.C.), affd 298 W.A.C. 214 (C.A.), leave to appeal to S.C.C. refused 344 W.A.C. 157*n*; *R. v. Giroux*, [2007] B.C.J. No. 2206 (QL) (C.A.); *R. v. Holtam*, [2002] B.C.J. No. 1164 (QL), 275 W.A.C. 278, 165 C.C.C. (3d) 502 (C.A.), leave to appeal to S.C.C. refused 170 C.C.C. (3d) vi; *Mentuck*, *supra*, footnote 14; *R. v. E. (O.N.)*, [2000] B.C.J. No. 1922 (QL) (S.C.), vard [2001] 3 S.C.R. 478, 158 C.C.C. (3d) 478, 47 C.R. (5th) 89; *Osmar*, *supra*, footnote 8; *R. v. H.*, *supra*, footnote 8.

(1) A "Mr. Big" Example

Nelson Hart (H) was charged in June 2005 with the deaths of his twin 3-year-old daughters (Krista and Karen) who died as a result of drowning on Sunday, August 4, 2002. He was interviewed by the police on three separate occasions during August and September, 2002 for a total of about eight hours. According to H, he had taken the girls to Little Harbour, about 20 minutes from their apartment, where there was a small playground with swings and a sandbox. There was also a public wharf. At some point, Krista fell off the wharf into the water. H could not swim. He panicked and left to get help, forgetting to take the other child. He also reported, during the third interview, that he had had a mini-mal seizure around the time that Krista fell of the wharf. He drove home and returned with his wife. Krista was found alive but later died at the hospital. Karen was pronounced dead at the scene.

The undercover operation commenced in October 2002. Initial surveillance had revealed that H was socially isolated, had few friends, and went everywhere with his wife (J). The police knew that H and J were on social assistance. H had a grade four education and a history of seizures that had become increasingly frequent and severe since a car accident in 1998. H was first approached by an operative who asked for H's help in locating his sister. The sister was found and H was paid for his help. H was asked for assistance with other jobs, such as making truck deliveries that paid H approximately $200 on each occasion. By February of 2003, the undercover operation had expanded. H was recruited to participate in criminal activity including dealing in fake credit cards, forged passports and counterfeit casino chips. H was told the gang was nationwide, and had branches in Vancouver, Montreal and Halifax. H was asked to break into an impounded vehicle and retrieve a parcel that had been stashed in it. He was gradually involved in

increasingly dangerous or illegal activities with commensurately more lucrative payoffs. H was told repeatedly that he was doing good work. At one point during the early stages of the operation, H suspected that he was transporting drugs. He voiced his concerns to his mother who called the RCMP, only to be told "If [the operative is] foolish enough to pay [him], then let him."[25]

During May and June of 2003, H was introduced to the boss who was another undercover operator posing as the head of the criminal organization. H was told that as long as he was part of the organization and loyal that the boss would take care of any problems. It was continually stressed at meetings and social occasions that you could not lie to each other or to the boss, the implication being that the boss had contacts and could find out the truth.

Social meetings were set up in St. John's, Halifax, Montreal and Vancouver. Operatives were often accompanied by their girlfriends, who were female undercover operators. H dined in the best of restaurants across Canada. Cost was not a factor. His hotel rooms were booked in the name of the trucking company that operated as a front for the criminal organization. J (H's wife) attended some of the dinners and was taken shopping in Halifax by one of the female operatives. A trip to the United States was planned with wives and girlfriends. To afford this, H wanted to be part of a big deal that he had been told was imminent. H wanted to move up the ladder, so to speak, but in order to do so the boss had to have him checked out. H provided his date of birth and social insurance number. H was then told that something had shown up in his past and the boss needed it cleared up. A meeting between H and the boss was arranged. H was warned not to lie to the boss. He was brought to a hotel room where a conversation took place between H and the boss. According to H's trial evidence, the boss would not accept H's explanation that he had had a seizure at the time of the drownings. The boss repeatedly told H not to lie to him. Eventually H told the boss that he had pushed both girls off the wharf and left the scene. H then accompanied one of

25. N. Kohler, "Two Girls, Three Years and a Mystery 'Mr. Big'", *Maclean's* (August 14, 2006), pp. 40-44.

the operatives to the crime scene where the drownings were re-enacted. The statements to the boss and the re-enactment were all covertly videotaped and were the primary foundation of the prosecution's case at the trial.

The trial judge noted that a great deal of effort had gone into building a relationship with H. Upon his arrest, H attempted to call one of the operatives for help. H was eager to please his "friends" and referred to two of the operatives as "almost like brothers". To the very end, H believed he was part of a criminal organization. At the *voir dire* into the admissibility of his statement, H testified that he had felt scared, trapped and intimidated at the meeting with the "boss". When the boss would not accept that he had had a seizure, he made up the scenarios that were videotaped. H's motive to lie was the money, friendships and lifestyle that he now enjoyed, following a lifetime of welfare and poverty. He also reported being afraid for his own safety should he displease the boss. The trial judge acknowledged that although there was evidence of violence and intimidation, it was not directed specifically at H and that in any case, H had taken no steps to try to leave the organization. If H was afraid, his fear, the judge found, was not obvious on the tapes played during the *voir dire*. The videotaped confessions were admitted into evidence. H was subsequently convicted of murder.

The implied threats described above in *R. v. H.* are standard practice in Mr. Big operations.[26] The purpose of these violent scenarios, as acknowledged by one of the operatives during cross-examination in *R. v. E. (O.N.)*,[27] is to demonstrate to the target that "the criminal organization would resort to deadly force to deal with persons who betrayed it".[28] In *R. v. Hathway*[29] the undercover operators staged an assault upon a woman. The target watched her (covered in what he believed to be blood) being thrown into the trunk of a car. During the simulated beating, the operative threatened to kill the woman,

26. *R. v. Bonisteel*, [2008] B.C.J. No. 1705, 236 C.C.C. (3d) 170, 61 C.R. (6th) 64 (C.A.); *R. v. Terrico* (2005), 199 C.C.C. (3d) 126, 353 W.A.C. 135, 31 C.R. (6th) 161 (C.A.), leave to appeal to S.C.C. refused 203 C.C.C. (3d) vi.
27. *Supra*, footnote 24.
28. *Ibid.*, at para. 37.
29. [2007] S.J. No. 245 (QL) (Q.B.).

her spouse and their two-year old child. Other tactics are introduced depending on the specific situation. For example, in *R. v. Proulx*[30] the undercover officers determined that the suspect's fiancée was so controlling that she was interfering with their operation, so they introduced a second female undercover agent who feigned interest in the target. In *R. v. Cretney*[31] the suspect was known to be alcoholic and struggling to abstain; the undercover plan's budget included a $1,500 allowance for liquor.

3. The Legal Landscape

(1) Avenues for Exclusion

Since the introduction of the "Mr. Big" technique in the early 1990s, a variety of challenges have been mounted to the admissibility at trial of confessions so obtained. In light of the undercover nature of the technique, however, the procedural protections that are available to suspects under the *Canadian Charter of Rights and Freedoms*[32] in the context of arrest and police interrogation are generally not available to the targets of Mr. Big investigations. As well, as we outline below, the Supreme Court of Canada has ruled that the common law confessions rule does not apply to undercover investigations. Additional efforts to challenge the admissibility of Mr. Big confessions have focused primarily on the potential unreliability of such evidence. Virtually without exception, these too have been unsuccessful. A discussion of the bases for these challenges and the governing jurisprudence follows.

(a) Confessions Rule

Despite the fact that a Mr. Big confession is obtained by police officers through the holding out of threats or inducements, the Supreme Court of Canada has ruled that such confessions are not subject to the common law confessions rule: *R. v. Hodgson*;[33] *R. v. Grandinetti*.[34] As such, the Crown is

30. [2005] B.C.J. No. 272 (QL), 29 C.R. (6th) 136 (S.C.).
31. [1999] B.C.J. No. 2875 (QL), 44 W.C.B. (2d) 498 (S.C.).
32. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

not required to establish the voluntariness of such a confession prior to seeking its introduction as evidence.

In *Hodgson*, the Supreme Court of Canada ruled that the application of the confessions rule should continue to require that the statement be made to a "person in authority". In determining that this element of the confessions rule should not be eliminated, Cory J. stated:[35]

> *In other words, it is the fear of reprisal or hope of leniency that persons in authority may hold out and which is associated with their official status that may render a statement involuntary.* The rule is generally not concerned with conversations between private citizens that might indicate guilt, as these conversations would not be influenced or affected by the coercive power of the state. This limitation is appropriate since most criminal investigations are undertaken by the state, and it is then that an accused is most vulnerable to state coercion.

Pursuant to *Hodgson*, it is not sufficient that the statement be made to a person who is, objectively speaking, a person in authority. Rather, it is the reasonable subjective belief of the declarant that determines whether the recipient is a "person in authority".[36] Cory J. also expressly noted that undercover police officers would not usually be considered to be persons in authority:[37]

> The issue will not normally arise in relation to undercover police officers. This is because the issue must be approached from the viewpoint of the accused. *On that basis, undercover police officers will not usually be viewed by the accused as persons in authority.*

In *Grandinetti*[38] the Supreme Court of Canada specifically considered the application of the confessions rule in the context of a Mr. Big investigation. A significant aspect of that case was that the undercover operatives had suggested to the suspect that they had corrupt connections in the police force who could influence the investigation. It was argued that, because the undercover operatives were holding themselves out as being capable of influencing the investigation, they became "persons

33. [1998] 2 S.C.R. 449, 127 C.C.C. (3d) 449, 18 C.R. (5th) 135.
34. *Supra*, footnote 17.
35. *Hodgson, supra*, footnote 33, at para. 24 (emphasis added).
36. *Ibid.*, at paras. 33 to 34.
37. *Ibid.*, at para. 48 (emphasis added).
38. *Supra*, footnote 17.

in authority" for the purpose of the confessions rule. On the basis of *Hodgson*[39] Abella J. dismissed this argument, stating:[40]

> The underlying rationale of the "person in authority" analysis is to avoid the unfairness and unreliability of admitting statements made *when the accused believes himself or herself to be under pressure from the uniquely coercive power of the state*. In *Hodgson*, although explicitly invited to do so, the Court refused to eliminate the requirement for a "person in authority" threshold determination.

As Grandinetti's subjective belief was that he was dealing with criminals with corrupt contacts, rather than persons acting on behalf of the state, his statements were not made to persons in authority.[41]

It is our view that by adopting an approach that excluded Mr. Big investigations from the confessions rule, the Supreme Court of Canada missed an opportunity to impose a degree of judicial control over potential excesses in the exercise of the Mr. Big technique and to reduce the possibility that the technique may produce false confessions. It is submitted that the requirement of the confessions rule that a suspect subjectively believe that he is dealing with a person in authority does little to advance the two fundamental concepts upon which the rule is based: concerns with respect to reliability and the ensuring of fairness by guarding against state coercion.[42] While the target of a Mr. Big investigation may not perceive himself to be subject to the coercive power of the state, the fact remains that the state is engaging in highly invasive behaviour and exercising a significant degree of control over the suspect through the creation and manipulation of the scenarios. With respect to issues of reliability, it is not persuasive that the interrogation context provides a unique or exclusive opportunity for the creation of false confessions through coercive techniques. The threats and inducements employed in the latter stages of Mr. Big operations may greatly exceed those which, if employed by a traditional person in authority, would render any subsequent statement involuntary.[43]

39. *Supra*, footnote 33.
40. *Grandinetti*, *supra*, footnote 17, at para. 35 (emphasis added).
41. *Ibid.*, at para. 44.
42. *Hodgson*, *supra*, footnote 33, at para. 48.
43. We explore the reliability issue more thoroughly in Part 4, *infra*.

Moreover, the confessions rule could be applied to Mr. Big confessions without extending its application to statements obtained during *any* undercover operation. It is important to recognize that there are substantial differences between Mr. Big investigations and other undercover techniques. For example, where an undercover operative is investigating ongoing criminal activities or attempting to infiltrate a criminal organization, the dangers that the confessions rule is designed to guard against will not readily arise because the state does not assume any significant degree of control over the individuals being investigated. The application of the confessions rule to such situations would be cumbersome[44] and would only marginally advance the purposes underlying the rule. In Mr. Big investigations, by contrast, the substantial resources of the state, both human and financial, are directed against an individual.[45] The state plays the role of a sophisticated criminal organization and controls the nature of its dealings with the suspect for the purpose of obtaining a confession. The significant exercise of state control over the suspect, coupled with the use of substantial inducements to elicit information, justifies a degree of judicial supervision of the technique to ensure that the goals of fairness and reliability underlying the confessions rule are achieved. Rather than finding that the rule had no application, the Supreme Court could have modified the confessions rule to reflect some of the differences between Mr. Big scenarios and standard police interrogations.

(b) Hearsay

Confessions made by a suspect during a Mr. Big operation are admitted under the traditional admissions exception to the hearsay rule. Subject to the confessions rule, admissions made by a party to a proceeding are admitted without any further demonstration of reliability. It is sufficient that they be tendered against the party.[46]

44. This point was made by the Attorney General of Canada in *Hodgson*, *supra*, footnote 33, at para. 25.
45. The cost of a recent four-month Mr. Big operation was reportedly $413,000. See Stephanie Porter, Tara Brautigam, "Wife sticks by man convicted for killing their twins", *Globe & Mail* (March 29, 2007), p. A3, regarding *R. v. H.*, *supra*, footnote 8.

Arguments have been advanced in Mr. Big cases that, in light of the Supreme Court of Canada's judgment in *R. v. Starr*,[47] the admissions exception to the hearsay rule should be re-examined to ensure that it is sufficiently based in reliability. Iacobucci J. noted in *Starr* that the traditional exceptions to the hearsay rule were open to re-examination in light of the principled approach to hearsay; however, he also expressed caution with respect to revisiting these traditional exceptions:[48]

> I hope from the foregoing that it is clear that the existing exceptions are a long-standing and important aspect of our law of evidence. I am cognizant of their important role, and the need for caution in reforming them. Given their continuing importance, I would expect that in the clear majority of cases, the presence or absence of a traditional exception will be determinative of admissibility.

In addition to the possibility that a traditional exception could be re-interpreted to conform to the requirements of necessity and reliability,[49] Iacobucci J. also recognized that, in a particular case, evidence falling within a valid traditional exception could nonetheless be excluded:[50]

> In some rare cases, it may also be possible under the particular circumstances of a case for evidence clearly falling within an otherwise valid exception nonetheless not to meet the principled approach's requirements of necessity and reliability. In such a case, the evidence would have to be excluded.

In *Osmar*,[51] counsel argued that the admissions exception was based upon the theory that statements against interest are inherently reliable. Since the circumstances of the Mr. Big scenario were designed such that any admission would not be perceived by the suspect as being against his interest, it was argued that Osmar's confession should have been excluded under the principled approach as being unreliable. Rosenberg J.A. dismissed the argument, relying upon the

46. *R. v. Evans*, [1993] 3 S.C.R. 653, 85 C.C.C. (3d) 97, 25 C.R. (4th) 46.
47. [2000] 2 S.C.R. 144, 147 C.C.C. (3d) 449, 36 C.R. (5th) 1.
48. *Ibid.*, at para. 211.
49. *Ibid.*, at para. 213.
50. *Ibid.*, at para. 214. In *R. v. Mapara*, [2005] 1 S.C.R. 358 at para. 34, 195 C.C.C. (3d) 225, 28 C.R. (6th) 1, it was noted that only in "exceptional cases" would a co-conspirator's statement that meets the traditional exception would be excluded under the principled approach.
51. *Supra*, footnote 8.

decision of the Ontario Court of Appeal in *R. v. Foreman*,[52] stating:[53]

> In my view, the hearsay issue has been determined against the appellant by this court's decision in *R. v. Foreman* (2002), 169 C.C.C. (3d) 489. As Doherty J.A. pointed out in *Foreman* at para. 37, by reference to *R. v. Evans* (1993), 85 C.C.C. (3d) 97 (S.C.C.), the rationale for admitting admissions by a party rests on the theory of the adversary system, not a necessity/reliability analysis.

Because Rosenberg J.A. did not consider the admissions exception to be based upon reliability, he determined that Osmar's confession was admissible without a demonstration of its reliability.

In *Terrico*[54] the British Columbia Court of Appeal considered the same argument that was advanced in *Osmar* with respect to revisiting the admissions exception. Huddart J.A. decided that there was no need for an inquiry into the reliability of the confession, for reasons similar to those of Rosenberg J.A. in *Osmar*.[55] In a concurring decision, Newbury J.A. determined that, as the Crown in the court below had conceded that the trial judge was permitted to consider the reliability of the confession under the principled approach, it was not necessary to decide the issue. Instead, assuming that such an approach was appropriate, she determined that the statements were sufficiently reliable to meet the threshold required for admissibility. In this regard, Newbury J.A. considered that the repeated directives by the undercover officers to Terrico that it was necessary to be truthful provided the statement with sufficient reliability.

In its recent judgment in *Bonisteel*, the British Columbia Court of Appeal addressed this issue again in the context of a Mr. Big case. After citing the relevant passages in *Terrico* and *Osmar*, Levine J.A. dismissed the argument, simply stating: "There is nothing in the circumstances of this case that suggests these principles do not apply."[56]

52. (2002), 169 C.C.C. (3d) 489, 6 C.R. (6th) 201, 62 O.R. (3d) 204 (C.A.), leave to appeal to S.C.C. refused [2003] 2 S.C.R. vii.
53. *Osmar supra*, footnote 8, at para. 53.
54. *Supra*, footnote 26.
55. *Ibid.*, at paras. 45 to 50.

The Alberta Court of Appeal, however, has recognized that the admissions can be excluded under the principled approach if they are not sufficiently reliable. In *Wytyshyn*, Fraser C.J.A. noted (albeit without substantial analysis in the judgment): "While there will be rare cases in which the principled approach will result in the exclusion of statements, even though they fall within one of the recognized common law exceptions, this is not one of them."[57] Similar to Newbury J.A.'s approach in *Terrico*, Fraser C.J.A. concluded that Wytyshyn's statements to undercover officers had sufficient reliability to warrant their admission, especially since Wytyshyn had been made aware of the need for accuracy in his statements to the undercover operative:[58]

> The circumstances in which the statements were made lend sufficient credibility to allow a finding of threshold reliability. *In this regard, we cannot ignore the fact that 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.

It is noted that the position adopted by the Ontario Court of Appeal and British Columbia Court of Appeal on this issue rests upon the view, accepted in *Foreman*, that the admissions exception is not based upon the presumed reliability of statements against interest but rather upon "the theory of the adversary system", as articulated by Sopinka J. in *Evans*. There are, however, several difficulties with this position. First, while *Evans*, which was decided a number of years before *Starr*, may accurately state the requirements of the traditional admissions exception, it should not be read as an attempt to reconsider the admissions exception in light of the principled approach to hearsay. Second, even if the admissions exception rests generally upon "the theory of the adversary system", it may not be contrary to the adversarial system to require Mr. Big confessions to meet a degree of threshold reliability. In the Mr.

56. *Bonisteel*, *supra*, footnote 26, at para. 84.
57. *R. v. Wytyshyn*, [2002] A.J. No. 1389 (QL) at para. 7 (C.A.), leave to appeal to S.C.C. refused [2003] 2 S.C.R. xi.
58. *Ibid.*, at para. 8 (emphasis added).

Big context, to argue that it does not lie in a party's mouth to complain about the reliability of his own statements is to ignore the fact that the state, which is also a party to the prosecution, is responsible for engaging in tactics that created the unreliable evidence in the first place.[59] Under the "theory of the adversary system", it is surely open to a party to complain about improper tactics used by their adversary that may tend to mislead the trier of fact. Indeed, such concerns are reflected in the underlying rationale for the confessions rule. Finally, as discussed below, the judgments of the Supreme Court of Canada in *Hodgson* and *Khelawon* suggest that the admissions exception may be based in part on the principle of reliability.

In contrast to Sopinka J.'s comments in *Evans*, Cory J. suggested in *Hodgson* that the admissions exception was grounded in concerns about reliability:[60]

> Historically the insistence that a confession must be voluntary related to concerns about the reliability of the evidence. *Indeed, the basis for the admission of a statement of the accused as an exception to the rule against hearsay is that what people freely say which is contrary to their interest is probably true.* However, where a statement is prompted by a threat or inducement held out by a person in authority, it can no longer be presumed to be true.

Similarly, in *R. v. Khelawon*,[61] the court touched upon the basis for the admissions and co-conspirators' exceptions to the hearsay rule. After noting that the reliability of other traditional exceptions may be founded in two factors (either that hearsay dangers are not present or that there is a circumstantial guarantee of reliability),[62] Charron J. stated:[63]

> Some of the traditional exceptions stand on a different footing, such as admissions from parties (confessions in the criminal context) and co-conspirators' statements: see *Mapara*, at para. 21. *In those cases, concerns about reliability are based on considerations other than the party's inability to test the accuracy of his or her own statement* or that

59. In both *Evans* and *Foreman*, the hearsay statements were received by third parties rather than state officials.
60. *Hodgson*, *supra*, footnote 33, at para. 17 (emphasis added).
61. (2006), 215 C.C.C. (3d) 161, [2006] 2 S.C.R. 787, 42 C.R. (6th) 1.
62. *Ibid.*, at paras. 61 to 64. As well, see *R. v. Czibulka* (2004), 189 C.C.C. (3d) 199 at pp. 211 to 212, 190 O.A.C. 1, 24 C.R. (6th) 152 (C.A.), leave to appeal to S.C.C. refused [2005] 1 S.C.R. xiv.
63. *Khelawon*, *supra*, footnote 61, at para. 65 (emphasis added).

of his or her co-conspirators. Hence, the criteria for admissibility are not established in the same way.

The court's reasoning therefore appears to recognize that "concerns about reliability" underlie the admissions exception and the co-conspirators' rule.[64]

If one accepts Justice Cory's comments in *Hodgson* that the admissions exception is based upon the recognition that freely made statements against interest are probably true, one can view the admissions exception as having a foundation in reliability. Following the principled approach to hearsay outlined in *Starr*, the admissions exception would then be open to re-interpretation to allow for the exclusion of confessions that do not meet a threshold of sufficient reliability. Aspects of the Mr. Big scenario could be found to sufficiently undermine the reliability of a confession so as to render it inadmissible because the surrounding circumstances may undermine the conclusion that the statement is either freely made or against interest. The strength of the inducements held out to the suspect and the persistent pressure to confess would be important factors in determining whether the statement was freely made, particularly where a benefit is offered by the undercover operatives that is directly linked to providing a confession to the targeted offence. Also important would be factors surrounding the confession that tended to minimize or eliminate negative consequences to the suspect who claims responsibility for the offence.[65] Apart from the fact that the degree of trust built up as part of the scheme would lead the

64. Indeed, in *Mapara*, *supra*, footnote 50, the Supreme Court of Canada recognized that the co-conspirator's exception is founded in reliability. The court noted that the requirement of proving that a conspiracy existed and that the accused was a probable member of the conspiracy provided a degree of reliability, as did the fact that only utterances made by co-conspirators *in furtherance* of the conspiracy were admissible under the exception. (See paras. 24 and 26.)

65. While these factors may be similar to those considered in assessing the voluntariness of a confession (see *R. v. Oickle*, *supra*, footnote 12), there would be significant differences between proceeding on a hearsay challenge and proceeding on a voluntariness *voir dire*. For example, the accused would bear the onus of establishing that the confession lacked sufficient reliability. In addition, factual determinations would be made on a balance of probability, rather than on the reasonable doubt standard under the confessions rule.

suspect to believe that his confession would not make its way to the authorities, other factors may provide the suspect with a positive incentive to claim responsibility for an offence he did not commit. Where, for example, Mr. Big tells the suspect that his arrest is imminent and he can only avoid it by having a terminally ill surrogate claim to be the perpetrator, it may be viewed as being *in the interest* of an innocent person to go along with the plan and avoid a false arrest.[66]

In assessing the threshold reliability of a Mr. Big confession, a court could also consider the presence of corroborating or conflicting evidence. While certain comments in *Starr* suggested that only the circumstances surrounding the making of the statement were relevant to threshold reliability, the Supreme Court of Canada made clear in *Khelawon* that a court may also consider extrinsic facts in determining whether a hearsay statement possesses sufficient reliability to warrant its admission.[67] Thus, where the resultant confession has significant discrepancies when compared to the known facts of the case, the reliability of the statement would be necessarily undermined. Conversely, where the confession contains unique or significant details that would only be known by the perpetrator, or where the confession leads to the discovery of new and corroborating evidence,[68] the reliability of the statement would be enhanced. Such an analysis would, however, have to be carried out in accordance with the limited role of the trial judge at the admissibility stage. As Charron J. stated in *Khelawon*:[69]

> Relevant factors should not be categorized in terms of threshold and ultimate reliability. Rather, the court should adopt a more functional approach as discussed above and focus on the particular dangers raised by the hearsay evidence sought to be introduced and on those attributes or circumstances relied upon by the proponent to overcome those

66. *R. v. Oickle*, *supra*, footnote 12.

67. *Khelawon*, *supra*, footnote 61, at paras. 94 to 100.

68. *Cf.* The Rule in *St. Lawrence*: in *R. v. St. Lawrence* (1949), 93 C.C.C. 376, 7 C.R. 464 (H.C.), McRuer C.J.H.C. held: "Where the discovery of the fact confirms the confession — that is, where the confession must be taken to be true by reason of the discovery of the fact — then that part of the confession that is confirmed by the discovery of the fact is admissible, but further than that no part of the confession is admissible."

69. *Supra*, footnote 61, at para. 93 (emphasis added).

> dangers. *In addition, the trial judge must remain mindful of the limited role that he or she plays in determining admissibility — it is crucial to the integrity of the fact-finding process that the question of ultimate reliability not be pre-determined on the admissibility voir dire.*

(c) Shocking the Conscience

In *Grandinetti*, Abella J. recognized that, although the confessions rule did not apply to Mr. Big scenarios, statements obtained under the technique could, in an appropriate case, be excluded where the degree of coercion employed compromised the reliability of the statement:[70]

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

However, appellate authorities from various provinces support the position that the use of the Mr. Big technique will not generally shock the conscience of the community.[71]

In *Osmar* Rosenberg J.A. determined that the technique employed in that case would not shock the community but acknowledged that the use of more extreme versions of the technique could result in exclusion:[72]

> The decision of the Supreme Court in *McIntyre* also directly meets the appellant's submission that the strategy employed in this case would shock the community. The facts in *McInytre* were certainly no worse than the circumstances of this case, yet the court held that "the tricks used by the police were not likely to shock the community". *I should not be taken as holding that the manner in which the Mr. Big strategy is executed could never shock the conscience of the community and lead to exclusion on common law grounds.* However, the facts of this case do not meet that test.

70. *Grandinetti*, *supra*, footnote 17, at para. 36.
71. See *R. v. Unger*, *supra*, footnote 8; *R. v. Grandinetti*, *ibid.*; *U.S.A. v. Burns* (1997), 117 C.C.C. (3d) 454, 152 W.A.C. 46, 8 C.R. (5th) 377 (B.C.C.A.), leave to appeal to S.C.C. refused 124 C.C.C. (3d) vi; *R. v. Roberts* (1997), 90 B.C.A.C. 213, 147 W.A.C. 213 (B.C.C.A.); *R. v. Bonisteel*, *supra*, footnote 26, at paras. 86 to 94.
72. *Osmar*, *supra*, footnote 8, at para. 48 (emphasis added).

It is worth noting that, elsewhere in the decision, Rosenberg J.A. characterized the operation in that case as a "comparatively mild" version of the technique. It remains unclear from the above authorities how far the police would have to escalate the Mr. Big scenario to shock the conscience of the community. The general ruse, the conscripting of the suspect into illegal activity and the offering of monetary incentives is insufficient to do so.[73] Creating an atmosphere where the suspect would realize that he risked death if he displeased Mr. Big is insufficient.[74] Undermining the suspect's relationship with his fiancée, which was seen as interfering with the operation, was also found not to shock the conscience.[75] Nor was the staging of a beating of a female undercover officer who had purportedly not been honest with Mr. Big.[76]

(d) Probative Value vs. Prejudicial Effect

A further issue to consider with respect to the admissibility of Mr. Big confessions is the discretion of a trial judge to exclude evidence when the probative value of the evidence is outweighed by its prejudicial effect.[77] In one case, *R. v. Creek*,[78] such an argument succeeded and the purported confession was excluded. While the specific frailties of the statement are not clear from the judgment, it is apparent that the relevant portions of the statement were "naked confessions" that did not reveal any details that would be known only to the killer.[79] Moreover, the balance of the statement, although replete with suggestions of serious prior

73. *U.S.A. v. Burns*, *supra*, footnote 71; *Osmar*, *ibid.*
74. *Burns*, *ibid.*
75. *R. v. Proulx*, *supra*, footnote 30, at paras. 38 to 52. Admittedly, Justice Williamson noted, at para. 44, that this conduct was tempered by the fact that the argument "falls when one notes that it was Proulx himself who volunteered that he was unhappy in the relationship and wished to get out of it, but could not for what appeared to be principally economic reasons".
76. *Bonisteel*, *supra*, footnote 26, at paras. 86 to 94.
77. *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 66 C.C.C. (3d) 321, 7 C.R. (4th) 117.
78. [1998] B.C.J. No. 3189 (QL), 42 W.C.B. (2d) 238 (B.C.S.C.).
79. *Creek*, *ibid.*, at para. 33.

bad conduct, was "internally inconsistent" and "ever changing". It also appeared that editing the statement would render the statement wholly unlike the original. In these circumstances, Stewart J. accepted the defence submission that the prejudicial effect outweighed the probative value of the statement.[80] In other Mr. Big cases in which *Creek* has been considered, however, it has been distinguished on its facts.[81]

In *Osmar*, Rosenberg J.A. also recognized that a Mr. Big confession could be excluded if its probative value was outweighed by its prejudicial effect. However, he found that the statements in that case had sufficient probative value to admit them:[82]

> *The most striking aspect of the confessions is the appellant's identification of the probable murder weapon in the first killing.* While the appellant testified that he received this information from the police, the prosecution witnesses denied passing on this information to him. This was an issue to be resolved by the jury.

In considering the balance between probative value and prejudicial effect, Rosenberg J.A. also considered the degree of coercion present in the scenario:[83]

> I am also of the view that it was for the jury to decide whether in the context of a meeting where he was seeking work, the inducement of a job in an illegal operation would be sufficient to cause the appellant to falsely confess to past deeds. *This was not a case of such extraordinary coercion that it can be said the statement is too unreliable to be received by the triers of fact*, nor a set of facts they would be unable to assess.

Finally, with respect to the argument that the admission of the confession would necessarily result in the introduction of prejudicial evidence that would portray the accused in disreputable light, Rosenberg J.A. noted that the jury had been cautioned against the misuse of such evidence and that the

80. *Ibid.*, at paras. 35 to 38. Notwithstanding the exclusion of the Mr. Big confession, Mr. Creek was convicted of second degree murder.
81. See *R. v. Caster*, [1998] B.C.J. No. 3178 (QL) (B.C.S.C.); *R. v. Redd*, [1999] B.C.J. No. 1471 (QL), 43 W.C.B. (2d) 62 (B.C.S.C.); *R. v. Raza*, [1998] B.C.J. No. 3242 (QL) (B.C.S.C.). In these cases, the confessions were found not to be naked or bald confessions, but rather were detailed and consistent with known facts regarding the offence.
82. *Osmar*, *supra*, footnote 8, at para. 49 (emphasis added).
83. *Ibid.*, at para. 50 (emphasis added).

evidence was required in order for the trier of fact to appreciate both the position of the Crown and that of the defence:[84]

> Its admission was necessary not just to understand the Crown's position but also the defence position that the police conduct had driven the appellant to resort to illegal employment. An analogous argument for rejecting a confession obtained through use of a polygraph was rejected by the majority in *R. v. Oickle*. See reasons of Iacobucci J. at para. 102 and Arbour J. dissenting at paras. 138-147.

In *Bonisteel*, counsel had sought to exclude or have edited statements related to prior bad acts, including prior drug dealing and two rape convictions relating to offences proximate in time to the murders. The trial judge, without expressly considering the possibility of editing the discussions between Bonisteel and Mr. Big, considered that the prejudicial portions of the statement were relevant to the truthfulness of Bonisteel's confession, stating at one point:[85]

> [W]e start off with, on the face of it initially, everything that passed between the accused and the undercover officers is relevant and has probative value because it gets at the relationship between the accused and the undercover officers as of October 26 when, on the face of it, he confesses.

The British Columbia Court of Appeal upheld the decision of the trial judge, noting: "the prejudicial evidence was neither 'irrelevant' nor 'unnecessarily prejudicial to the accused', so the duty to edit did not arise".[86] A prophylactic warning to the jury was found to be sufficient to offset the potential for prejudice.

It is clear from the cases above that a Mr. Big confession could be excluded if its prejudicial effect were found to outweigh its probative value. Such a determination could involve consideration of the degree of coercion employed and the reliability of the confession when compared to the objective facts surrounding the offence. However, in light of the authorities above, it should be anticipated that exclusion would occur only with respect to minimally probative confessions or in cases where the confession also contained

84. *Ibid.*, at para. 51.
85. *Supra*, footnote 26, at para. 36.
86. *Supra*, footnote 8, at para. 48.

extremely prejudicial evidence or was the product of extraordinary coercion.

(e) Section 7 — The Right to Silence

In *Osmar*, Rosenberg J.A. determined that the right to silence under s. 7 of the Charter does not apply in the context of Mr. Big investigations because the suspect is not detained.[87] As such, the elicitation of information in the course of the scheme did not violate the principles of fundamental justice. Importantly, however, Rosenberg J.A. left open the possibility that s. 7 could be engaged in circumstances where the individual, "although not in detention, was nevertheless under the control of the state in circumstances functionally equivalent to detention and equally needing protection from the greater power of the state".[88] It remains to be seen what degree of control would be required under the Mr. Big technique to meet this threshold.[89]

(f) Sections 7 and 8 — Security of the Person and Unreasonable Search and Seizure

Challenges to the Mr. Big technique have not routinely been advanced on the basis that the technique violates the right to be secure from unreasonable search and seizure pursuant to s. 8 of the Charter. However, there is some case law suggesting that, "when the police pervasively invade a suspect's life over a period of time, the suspect's reasonable expectation of privacy may be infringed. As well, an argument may be advanced that an invasive and extensive undercover operation may have such a substantial impact on an individual that it constitutes an infringement of the guarantee of security of the person under s. 7 of the Charter.

As a starting point, one must acknowledge the effect of the Supreme Court of Canada's decision in *R. v. Duarte*.[90] In *Duarte*, it was decided that the police cannot engage in the

87. Similar conclusions were reached in *Burns*, *supra*, footnote 71; *Grandinetti*, *supra*, footnote 7, and *Unger*, *supra*, footnote 8.
88. *Osmar*, *supra*, footnote 8, at para. 42.
89. As we argue in Section 4, the degree of control present in most Mr. Big cases is far greater than has been hitherto appreciated.
90. [1990] 1 S.C.R. 30, 53 C.C.C. (3d) 1, 74 C.R. (3d) 281 *sub nom. R. v. Sanelli.*

electronic recording of participant surveillance in the absence of judicial authorization. It is implicit in the decision that, where there is no electronic recording, some types of contact between targets and informers or undercover operatives will not result in a violation of s. 8 of the Charter. La Forest J. commented as follows:[91]

> To conclude, the *Charter* is not meant to protect us against a poor choice of friends. If our "friend" turns out to be an informer, and we are convicted on the strength of his testimony, that may be unfortunate for us. But the *Charter* is meant to guarantee the right to be secure against unreasonable search and seizure. A conversation with an informer does not amount to a search and seizure within the meaning of the *Charter*. Surreptitious electronic interception and recording of a private communication does.

However, *Duarte* does not stand for the proposition that, in the absence of electronic recording, undercover operations are completely immune from scrutiny under s. 8.[92] Subsequent to *Duarte*, at least two cases have recognized that intensive undercover operations have the potential to breach s. 8 of the Charter.[93]

In *R. v. Love*,[94] the police conducted a five-week undercover operation for the purpose of befriending the suspect and obtaining a bodily sample. The decision of the Court of Appeal focused upon the legality of two seizures of bodily substances that occurred during the course of the operation. However, Kerans J.A. also considered the nature of the ongoing undercover operation and found that surveillance may amount to an unreasonable search if it amounts to

91. *Duarte*, *ibid.*, at para. 50, p. 57.
92. The facts in *Duarte* did not involve an invasive undercover operation.
93. In should be noted that in *R. v. Fliss*, [2002] 1 S.C.R. 535, 161 C.C.C. (3d) 225, 49 C.R. (5th) 395, the Supreme Court considered the application of *Duarte* in a case involving a Mr. Big scenario. However, it is important to recognize that the appeal before the Supreme Court of Canada was as of right based on a dissent at the British Columbia Court of Appeal. As a result, on the case before the Supreme Court of Canada, the only Charter breach related to the recording of meetings between Mr. Big and Fliss over two days without a warrant. Thus, whether the nature of the ongoing Mr. Big operation against Fliss could have constituted a broader breach of his s. 8 privacy rights was not addressed.
94. (1995), 102 C.C.C. (3d) 393, 102 W.A.C. 360, 36 Alta. L.R. (3d) 153 (C.A.), leave to appeal to S.C.C. refused 105 C.C.C. (3d) vi.

harassment of the accused. In addition, Kerans J.A concluded:[95]

> Aside from any issue of consent, or any issue about a sense of harassment, *I am, however, of the view that a scheme to watch the accused, and gain his consent to being watched by false and misleading statements, could be so invasive of one's normal expectation of privacy as to amount to an unreasonable search.* It would, however, require more than just surveillance, and more than surveillance facilitated by false assurances to the suspect. It would require that this situation continue for some time, and pervasively invade the life of the suspect.

Kerans J.A. then determined that the conduct in that case constituted a breach of s. 8 of the Charter.[96]

> In my view, the behaviour of the undercover officers here, viewed globally, met and surpassed that standard. *Not only did they become close, if false, friends with the accused, they led him on into a series of adventures for over one month, much of which had nothing to do with the ultimate success.* In my view, *by the time this operation ended, they had indeed crossed the line and destroyed his normal and reasonable expectation of privacy.*

Dix[97] was a civil suit for malicious prosecution and other misconduct arising from the prosecution of Dix for murder. The charge against Dix was resolved in his favour when, partway into his trial, the Crown withdrew the charge on the basis that there was no reasonable prospect of conviction. During the investigation, Dix was subjected to a Mr. Big operation. In the initial stages, the details of the operation were similar to other Mr. Big cases. Over a number of months, Dix was conscripted into the fictitious illegal activities of the gang. Dix met Mr. Big, who tried to get him to admit responsibility for the targeted murders. The tactics included an offer to have a terminal cancer patient take responsibility for the murders. Dix, however, maintained his innocence. A further escalation ensued, involving the commission of a faked homicide by one of the undercover operatives while Dix acted as lookout. Dix left the scene with the supposed shooter and they discussed efforts to cover up the homicide. He was then placed on a plane and flown to Vancouver, where he met with other undercover

95. *Ibid.*, at para. 16.
96. *Ibid.*, at para. 17.
97. *Supra*, footnote 19.

operatives posing as gang members. A final attempt was made to get Dix to admit involvement in the homicides. As Ritter J. described:[98]

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

When Dix failed to confess following the staged homicide, the undercover operation was terminated.

Ritter J. referred to the decision in *Love* and considered the nature of the undercover technique used in Dix's case. He found that the undercover operation had breached Dix's expectation of privacy by pervasively invading his life over a period of time:[99]

> From this quotation, it is apparent that the adventures into which the R.C.M.P. led the Plaintiff went significantly further than the one referred to in *Love*, *supra*. It is perhaps worth noting that *I am not saying, nor do I find my Court of Appeal to be saying, that all undercover police operations intended to gain the confidence of a suspect in order to obtain inculpatory evidence will necessarily cause a Charter breach. It will depend on the facts of each case whether the police cross the line, including going beyond simply surveying the suspect, and moving into the more dangerous territory of providing false assurances and breaching the suspect's expectation of privacy for some time in a way which pervasively invades the life of the suspect.* In this case, however, the police clearly did significantly and seriously cross that line with Operation Kabaya. Their conduct, therefore, constitutes a breach of the Plaintiff's rights to privacy.

Later in the decision, Ritter J. expressly determined that the conduct during the undercover operation violated ss. 7 and 8 of the Charter:[100]

98.. *Dix*, *ibid.*, at para. 130.
99. *Ibid.*, at para. 547.
100. *Ibid.*, at para. 548.

> Finally, I conclude that Operation Kabaya was so invasive, and to be for a sufficient period of time, as to be an unconstitutional invasion of the Plaintiff's right to privacy under ss. 7 and 8 of the *Charter*. None of these breaches of the Plaintiff's rights were prescribed by law; consequently, none can be justified under s. 1 of the *Charter* (*Broyles, supra*).

If the standard adopted in *Love* and *Dix* is correct, it is arguable that many Mr. Big scenarios would infringe the reasonable expectation of privacy of the target. It is our view that the recognition that ss. 7 and 8 of the Charter can apply to invasive undercover techniques would be a positive step towards limiting the potential for excesses in the implementation of the technique.[101] Such an approach would also provide an important measure of police accountability, as the Mr. Big technique could become subject to a scheme of prior judicial authorization.[102] Of necessity, such a system of judicial supervision would require some latitude in the scope of authorization granted, in order to provide the police with the flexibility to react as the undercover scenario develops. Police would, however, be required to demonstrate an objective justification prior to engaging in invasive investigative techniques. As well, persons charged as a result of Mr. Big scenarios may have expanded bases at trial to challenge the admissibility of the evidence so obtained. The system could provide for after-the-fact notification of targets who, in the absence of charges being laid, might otherwise be oblivious to the fact that the unsavoury characters who had temporarily invaded his or her life were in fact police officers.

As we discuss in part 4, *infra*, extensive and pervasive

101. The Supreme Court of Canada has recognized that s. 7 of the Charter may be infringed as a result of "serious state-imposed psychological stress" or through state interference with "fundamental or inherently personal choices": *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at paras. 49 to 57, 190 D.L.R. (4th) 513, [2000] 10 W.W.R. 567; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at paras. 58 to 65, 177 D.L.R. (4th) 124, 216 N.B.R. (2d) 25; *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at para. 66, 152 D.L.R. (4th) 577, 97 C.L.L.C. ¶210-031; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at pp. 587-88, 85 C.C.C. (3d) 15, 24 C.R. (4th) 281.

102. In the absence of specific legislation governing the technique, police could resort to the general warrant provisions under s. 487.01 of the *Criminal Code*.

invasions of the target's life by the State may significantly contribute to the unreliability of any confession obtained through the Mr. Big technique. The placing of constitutional limits on the scope of such investigations could thus have the effect of furthering the truth-finding function of the criminal process.[103]

(2) Mode of Trial

By the very nature of the technique, the introduction into evidence of a Mr. Big confession will usually also result in the admission of significant bad character evidence in relation to the target. Such evidence may include:

(i) the accused's willing association with the (fictitious) criminal organization;
(ii) the notional crimes "committed" by the accused during the early scenarios;
(iii) the accused's accession to Mr. Big's proposal for dealing with the problem presented by the accused's suspected involvement in the offence under investigation, which may involve an obstruction of justice through the use of corrupt police contacts or having someone else falsely claim responsibility for the offence; and
(iv) discussions with undercover operatives about other criminal activity, including the target's prior criminal convictions.[104]

Notwithstanding limiting instructions that may be given to a jury, this evidence of bad character creates the potential for both moral and reasoning prejudice.[105]

Concerns with respect to bad character evidence may be particularly pronounced in jury trials and, correspondingly, are reduced in judge-alone trials.[106] Most prosecutions in Mr. Big

103. See section 4(4), *infra*.

104. See *Bonisteel*, *supra*, footnote 26, where the accused's criminal record for two rapes was admitted into evidence as it was considered relevant to the nature of the relationship between the undercover operatives and the accused.

105. See Part 4(2), *infra*, and *R. v. Handy*, [2002] 2 S.C.R. 908 at paras. 139, 141 and 144-46, 164 C.C.C. (3d) 481, 1 C.R. (6th) 203.

106. See *R. v. Pollock* (2004), 187 C.C.C. (3d) 213 at para. 100, 188 O.A.C. 37, 23

cases, however, are for murder, an offence which, in absence of Crown consent, must be tried by a jury.[107] The accused thus faces a real potential for prejudice through the introduction of extensive bad character evidence while having no right to unilaterally dispense with "the benefit of trial by jury" guaranteed by s. 11(f) of the Charter.[108]

Crown practice with respect to consenting to judge-alone murder trial varies from province to province. Such consent appears to be more forthcoming in the Western provinces, where a number of Mr. Big cases have proceeded on a judge-alone basis;[109] some of these cases have resulted in acquittals.[110] In *Mentuck*, for example, Morrison J. concluded that the inducements inherent in the technique used in that case rendered the accused's confession unreliable:[111]

> I fully recognize that when the police are attempting to solve crimes and, in particular, to obtain admissions from people they honestly believe to be suspect, that they may be required to resort to tactics which some may describe as unfair or dirty. It is unnecessary for me to consider or make comment about that here. But, in my view, the police must 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. In this case, in my view, the level of inducement was overpowering. As I have already said, it provided nothing but upside for the accused to confess and a downside of frustration and despair in maintaining his denial. I conclude that the confession, if not false, is certainly too unreliable for acceptance as an admission of guilt.

C.R. (6th) 98 (C.A.), leave to appeal to S.C.C. refused [2005] 1 S.C.R. xiv; *R. v. B. (T.)*, [2009] O.J. No. 751 (QL) at para. 33, 243 C.C.C. (3d) 158, 63 C.R. (6th) 197 *sub nom. R. v. B. (R.T.)* (C.A.).

107. See *Criminal Code*, s. 473.

108. In *R. v. Turpin*, [1989] 1 S.C.R. 1296, 48 C.C.C. (3d) 8, 69 C.R. (3d) 97, the Supreme Court of Canada concluded that s. 11(f) of the Charter did not provide accused persons with a constitutional right to a judge-alone trial in cases where a jury trial was not perceived to be a benefit. At the time of the trial decision in *Turpin*, the *Criminal Code* did not allow for judge-alone murder trials at all, except in the province of Alberta at the accused's election.

109. *E.g., Mentuck*, *supra*, footnote 14; *R. v. Black*, *supra*, footnote 24; *R. v. Wilson*, [2007] B.C.J. No. 2892 (QL) (S.C.); *R. v. S. (C.K.R.)*, [2005] B.C.J. 2917 (QL) (S.C.); *R. v. F. (G.W.)*, [2000] B.C.J. No. 1062 (QL), 20 O.A.C. 78 (S.C.); *R. v. Bicknell*, [2003] B.C.J. No. 2312 (QL), 59 W.C.B. (2d) 425 (S.C.).

110. *E.g., Mentuck*, *ibid.*; *R. v. S. (C.K.R.)*, *ibid.*; *R. v. M. (T.C.)*, [2007] B.C.J. No. 2705 (QL), 77 W.C.B. (2d) 393 (S.C.) (as T.C.M. was a young person, he was entitled to elect trial by judge alone pursuant to s. 67(1)(c) of the *Youth Criminal Justice Act*).

111. *Mentuck*, *ibid.*, at para. 100.

Counsel defending Mr. Big cases should give serious consideration to seeking Crown consent to try the matter without a jury.[112] Should the Crown withhold consent to having a judge-alone trial, however, the court may only review such an exercise of Crown discretion if it is shown that it was exercised arbitrarily, capriciously or for some improper purpose, such as where the Crown's conduct may deprive an accused of a fair trial.[113] Depending upon the facts of a particular case, it is arguable that the admission of extensive bad character evidence as part of the context of a Mr. Big sting may risk compromising the accused's fair trial rights to such a degree that a court would be warranted in overriding the withholding of consent by the Crown to dispense with a jury.

4. Psychological Perspectives

From a psychological perspective, the custodial bright line can be illusory in terms of the exercise of control. The state's "superior resources and power" are not restricted to the interrogation room or a jail cell. The engineering of a new social world and the orchestration of the target's actions for months at a time may constitute, in psychological terms, quintessential "control". The state's agents are not rendered impotent simply because they are pretending *not* to be state agents. On the contrary, it is quite conceivable that the risk of a false confession may be even greater under such circumstances because the suspect does not appreciate the adverse consequences of his admissions. Lying about a murder to a gang of criminals could be a gamble that the suspect is prepared to take, compared to upsetting them, inviting their wrath, and squandering his connection to the criminal organization. Indeed defendants often take the position that their

112. The waiver of the constitutional guarantee of a jury trial must, of course, only occur with the informed consent of the accused person.

113. *R. v. E. (L.)* (1994), 94 C.C.C. (3d) 228, 75 O.A.C. 244, [1994] O.J. No. 2641 (QL) (C.A.); *R. v. McGregor*, [1992] O.J. No. 3040 (QL) (Gen. Div.), affd 134 C.C.C. (3d) 570, 43 O.R. (3d) 455, 22 C.R. (5th) 233 (C.A.); *R. v. Ng* (2003), 173 C.C.C. (3d) 349, [2003] 11 W.W.R. 429, 12 C.R. (6th) 1 (Alta. C.A.), leave to appeal to S.C.C. refused [2004] 1 S.C.R. xii.

confession was untrue, and rather the result of avarice[114] or fear.[115]

Case law (*e.g.*, *Hodgson*) emphasizes the power of the state, and implies that this power is most potent when the state agent is identified as such. However, in a Mr. Big operation, fear of reprisal on the part of the "boss" would certainly be operating. The state has crafted a situation in which the target is in a chronic state of trepidation. The boss' displeasure may unleash "deadly force" and the target knows this. He may already have witnessed the brutality of the boss's retribution first hand (*e.g.*, *Hathway*[116]). Similarly the good will of the boss carries with it material comforts, companionship, steady work and psychological security. Targets of Mr. Big, who may be destitute to begin with, are frequently remunerated at a rate of at least one hundred dollars an hour.[117] These powerful threats and enticements are a direct result of the "superior resources and power" that are at the state's disposal. From a psychological stance, under these circumstances both custodial status and knowledge regarding state agency are moot.

It is a well-established principle of social science that people are heavily influenced by the situations they find themselves in.[118] There are basic core principles of psychology that are solidly grounded in research findings that are relevant to the psychological mechanisms inherent in a Mr. Big operation. The principles of social cognition and persuasion that underlie manipulating a person's behavior have been identified and elaborated upon for decades. What is unique is the focus on forensic contexts in which false confessions occur, not the principles themselves. In what follows we provide an overview of some of the psychological processes that may be at work during a Mr. Big operation — processes that are integral to an assessment of the reliability of a disputed confession.

114. *R. v. Unger*, *supra*, footnote 8; *R. v. Fliss*, *supra*, footnote 18. See also G.H. Gudjonsson, *The Psychology of Interrogations and Confessions* (West Sussex, U.K.: Wiley, 2003), p. 582.
115. *R. v. F. (G.W.)*; *R. v. Holtam*, both *supra*, footnote 24.
116. *Supra*, footnote 29.
117. *R. v. Mentuck*, *supra*, footnote 14.
118. B. Latane, "The Psychology of Social Impact" (1981), 36 American Psychologist 343; L. Ross and R. Nisbett, *The Person and the Situation; Perspectives of Social Psychology* (New York: McGraw-Hill, 1991).

Most of us, including many psychologists, would be surprised if not astounded at what people are apparently willing, ready and able to do — solely as a result of being directed to perform an act by a perceived authority figure.[119] Stanley Milgram's oft cited obedience studies demonstrate the potency of social forces. The research paradigm involved individual participants delivering a sequence of what they believed to be painful electric shocks to another person. Under the guise of a "learning study", they were instructed to increase the shock level each time the "learner" made an error. The white-coated research director acted as a legitimate authority figure — presenting the rules, assigning the roles (*i.e.*, teacher, learner), and enjoining the teachers to continue whenever they hesitated or dissented. Despite some ambivalence, two thirds of the particpants complied with the director's instructions and repeatedly delivered 450 volts of electricity to the "learner-victim".[120]

The establishment of "authority" and power is a fundamental feature of the Mr. Big scheme, as is illustrated in this exchange during the cross examination of a Mr. Big operative:[121]

Q Now the whole purpose of the persona that you were putting forward was that you can plan anything, correct?
A Yes.
Q That you can find anyone, correct?
A Yes.
Q That you can do anything, correct?
A Yes.
Q That you have insiders in the police, correct?
A Yeah, sure.
Q Okay. That you can get to anyone, right?
A Sure.
Q That you can frame people, correct?
A Yeah.
Q And that given the scenario in Edmonton that you will brutally beat and torture people. Is that correct?
A Yes, it is.

119. P. Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* (New York: Random House, 2007).
120. S. Milgram, *Obedience to Authority* (New York: Harper & Row, 1974).
121. *R. v. Anderson*, preliminary inquiry, held in the Provincial Court of Alberta before Delong J., Calgary, February 4-7, 11-14, 2008, Vol. 3, pp. 707-708.

(1) Carrots and Sticks

Contrast the Milgram situation with the social forces involved during a Mr. Big operation. In the former setting, the "research director" and the person delivering the shocks (the "researcher") are strangers to one another. The operatives in a Mr. Big scenario, however, are anything but strangers. Mr. Big operatives purposefully infiltrate the suspect's life. If the target has no friends, they provide some. If he has low self-esteem, they bolster his feelings of self worth. If he has no money, they supply it. If he has no long-term prospects, they hold out the expectation of steady work. If he is an alcoholic, they give him liquor. If he is naïve and uncomfortable around women, an appreciative female friend is made available. In effect, a new enhanced and promising social world is created for the suspect, with tentacles that affect much of his behaviour (and thought) even when he is not in direct contact with his newfound companions. An important feature of this contrived social dynamic is that the suspect is manipulated by his new friends to perceive them as skilled, knowledgeable, powerful, well-connected and successful — and of course as the key to his continued social and financial vitality. As such, they are influential social agents.[122] Their overtures are flattering and seductive. His friends let him know that he is valued and trusted, and that they themselves are principled and loyal, albeit crooks.

In addition to these many positive inducements, there is the added and critical dimension of fear. Much effort is devoted by the undercover operatives to the creation of an atmosphere of apprehension. Should the target fall into disfavour with his controllers, brutal force will be swiftly dispensed. Staged retaliations against fictitious transgressors make it clear to the target that his physical well being, if not his life, are at risk if his loyalty to the group is seen to waver. The combination of enticements and fear constitutes an almost irresistible degree of psychological influence and control. Consequently, when the suspect is directed to carry out some specified activity, he has

122. R.B. Cialdini, "Harnessing the Science of Persuasion" (2001), 79 Harv. Bus. Rev. 72.

every reason to comply. In the suspect's new circle of friends, criminal acts are both normative and lucrative.

People will engage in behaviours for which they are rewarded.[123] This principle is exploited by parents, teachers, therapists, animal trainers, and, in a Mr. Big context, by trained police officers. People's actions are influenced more by expectations of short-term gain than long-term consequences. They have a myopic inclination to over-value the present[124] and are therefore susceptible to manipulation from anticipated rewards on the near horizon. We also know that people select options that they believe will maximize their self-interests under "current" circumstances.[125] They are more attuned to relatively immediate outcomes as opposed to delayed gratification. These tendencies are systematically exploited by Mr. Big operatives as the following example illustrates:[126]

> I had a large flash roll with me; in other words, I had a large bundle of money which was designed strictly for X to see. I was aware that he was in a financial crisis or he didn't have a lot of money. And I was establishing the fact that I did. I was simply baiting the hook ensuring that he would want to have future contact with myself . . .
>
> Our whole role is evolving scenario by scenario, and little bits are becoming more obvious. I'm enhancing the story. I'm enhancing the criminal organization. I'm enhancing their involvement It makes them curious to come back the next time. The next time you give a little bit, it makes them curious to come out the next time. And it grows from there. And that's how you a bait a hook . . . We're paying them. There's no two ways about it. We pay them because we view that as an incentive to ensure future participation, and they are doing what they think is [*sic*] criminal acts to justify that payment. But at the same point in time, they also see us as a form of income. X was continually asking for money.

123. E.L. Thorndike, *Human Learning* (New York: Appleton-Century-Crofts, 1931); E.L. Thorndike, *The Fundamentals of Learning* (New York: Bureau of Publications, Teachers College, Columbia University, 1932).

124. L. Green, A. Fry and J. Myerson, "Discounting of Delayed Rewards: A Life-span Comparison" (1994), 5 Psychological Science 33.

125. E.L. Hilgendorf and M. Irving, "A Decision-making Model of Confessions", in M. Lloyd-Bostock, ed., *Psychology in Legal Contexts: Applications and Limitations* (London: Macmillan, 1981); D. Davis and W.T. O'Donohue, "The Road to Perdition: Extreme Influence Tactics in the Interrogation Room" in W.T. O'Donohue and E.R. Levensky, eds., *Handbook of Forensic Psychology: Resource for Mental Health and Legal Professionals* (New York: Elsevier, 2004); R. Ofshe and R. Leo, "The Decision to Confess Falsely: Rational Choice and Irrational Action" (1997), 74 Denver U. L. Rev. 979.

126. *Supra*, footnote 121, at pp. 641-42, 650 and 652.

The target is compensated generously but intermittently. "Baiting the hook" is standard practice. Promises of very large payoffs on the near horizon are frequently alluded to, but never materialize.

(2) Reactions to Confession Evidence

Jurors might well have difficulty evaluating confession evidence without assistance because of the "attribution error". It is well documented in the social psychology literature that when people seek to explain another's behaviour, they are predisposed to overlook or underestimate the social circumstances that are operating, and tend to attribute the causes of behaviours or decisions to internal motives, if not "character flaws". The propensity is so widespread that it has been labelled "the fundamental attribution error".[127] For example, when Milgram[128] asked a group of laypeople and a group of psychiatrists to predict how many ordinary people would willingly deliver what they believed to be lethal amounts of electric shock to an innocent stranger, if instructed to do so by someone in authority, both groups greatly underestimated the obedience rates, with many of the psychiatrists opining that only sadists would engage in such reprehensible behavior. In fact, Milgram's research participants were neither psychologically disturbed, nor mean-spirited. They were simply co-operative and compliant. It is also worth noting that the social dynamics operating in Milgram's demonstration were relatively benign. Beyond whatever "authority" is conferred by the title of "research director" and being dressed in a lab coat, there existed no institutionally legitimized power over the participants. They had agreed to take part in a scientific study of memory and learning, for which they were paid $4/hour. When instructed by the research director to increase the amount of shock they were delivering to a complete stranger, most did so, and continued to increase the voltage as directed. They could have walked away. Few did. This point is fundamental to what we consider to be a

127. Ross and Nisbett (1991), *supra*, footnote 118.
128. *Supra*, footnote 120.

profound imbalance between legal and psychological conceptions of "voluntariness". As McLachlin J. states in *Hebert*:[129]

> The state has the power to intrude on the individual's physical freedom by detaining him or her. *The individual cannot walk away*. This physical intrusion on the individual's mental liberty in turn may enable the state to infringe the individual's mental liberty by techniques made possible by its superior resources and power.

Our point is that the "resources and power" of the state can be every bit as subversive of an individual's mental liberty when the suspect is not in physical custody as when he or she is in a prison cell. If reliability is at the crux of the confession rule, then the custodial status of the suspect is of little moment. The superior resources and power — and trickery — of state agents can be wielded anywhere, sometimes with disastrous results.

Documented DNA exonerations of innocent defendants who provided false inculpatory statements prior to their trial convincingly demonstrate the unreliability of confessions.[130] The jury convictions in these cases (73% to 81% conviction rates) also demonstrate that confessions, even when erroneous, appear no less powerful to jurors than truthful confessions. They are highly persuasive and countless juror simulations[131] attest to the persuasive impact that a confession can have on the jury. A confession is, in legal terms, an "admission against self-interest". A person who confesses to a misdeed is inviting censure, if not punishment. Why on earth would somebody make such a damning admission if it were not true? It defies common sense. A confession is compelling to jurors. It is one of the most important forms of evidence influencing jurors' determination of guilt,[132] and along with mistaken

129. *Supra*, footnote 4, at para. 63 (emphasis added).
130. S.A. Drizin and R. Leo, "The Problem of False Confessions in a Post-DNA World" (2004), 82 North Carolina L. Rev. 891; B. Scheck, P. Neufeld and J. Dwyer, *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* (Garden City, NJ: Doubleday, 2000).
131. S.M. Kassin and K. Neumann, "On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis" (1997), 21 Law and Human Behavior 469; S.M. Kassin and H. Sukel, "Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule" (1997), 21 Law and Human Behavior 27.
132. Kassin and Neumann, *ibid.*

identification evidence, it is the predominant cause of factually wrongful convictions. Its impact is so potentially prejudicial that confessions — when made to persons in authority — remain the single admissibility issue that must be determined on a standard of proof beyond reasonable doubt and along with mistaken identification evidence, the most significant basis for factual miscarriages of justice.

Mock jury research confirms that people trust confessions and have difficulty disregarding them even when there are good reasons to do so.[133] In a study conducted by Kassin and Sukel,[134] mock jurors received different versions of evidence in a hypothetical murder trial. One included a low-pressure interrogation in which the defendant immediately confessed to the police upon questioning; the second contained a high-pressure interrogation in which the detective, *with gun drawn*, frightened the suspect who appeared to be in pain and pressured him to confess; a third (control) condition lacked a confession. Participants perceived the high pressure confession to have been involuntary and reported that the confession had not influenced their decision about guilt or innocence. However, the high pressure condition produced a conviction rate that was much higher than that found in the control group. This increase in conviction rate also occurred when the mock jurors were instructed to disregard the confession, which they had indeed judged to be coerced. In short, although the jurors felt they were behaving as they legally should, their verdicts suggested otherwise, leading Kassin and Neumann to conclude that "confession evidence is inherently prejudicial and that people do not discount it even when [it is] legally appropriate to do so".[135]

Jury research also suggests that the confession, even if seriously flawed, can taint jurors' perception of other evidence at trial. To assess this hypothesis, Ray and Kassin[136] presented

133. S. Kassin and L. Wrightsman, "Prior Confessions and Mock Juror Verdicts" (1980), 10 Journal of Applied Social Psychology 133. S.M. Kassin and L.S. Wrightsman, "Confession Evidence" in S. Kassin and L. Wrightsman, eds., *The Psychology of Evidence and Trial Procedure* (Beverly Hills, CA: Sage, 1985), pp. 67-94.
134. *Supra*, footnote 131.
135. *Supra*, footnote 131, at p. 471.
136. Ray and Kassin, "Where There's Smoke There Must Be Fire: How Weak

mock jurors with a trial summary of an actual case in which the 17-year-old male defendant was convicted of killing his parents. The conviction was obtained on the basis of a handwritten confession that the *police* had crafted (*not* the suspect) hours after the discovery of the bodies. The detectives had lied egregiously about the evidence, and the defendant had refused to sign the confession. Research participants received one of four versions of the case. The first contained the contrived statement that the defendant had allegedly given to the police. In the second version the defendant was described by the detectives as unemotional at the time of the arrest. The third version included both of these pieces of information, and the fourth omitted the information (control). Compared with the control condition, in which verdicts were almost evenly divided (53% guilty judgment), the manufactured "confession" increased convictions slightly (69%). When presented in isolation, the evidence regarding the defendant's demeanour had no impact (48%), but when it was combined with the flawed confession, the conviction rate was boosted to 88%.

Neuschatz[137] and his colleagues appraised the impact of "secondary" confessions (*e.g.*, from accomplices or jailhouse informants) on mock jurors' judgments of guilt. Not only did the confessions increase the conviction rates, jurors were unaffected by knowledge of whether the cooperating witness received an incentive in exchange for the testimony. Confessions have even been shown to contaminate the impact of what would otherwise have been independent exculpatory evidence.[138] When eyewitnesses to a mock crime were told that a different line-up member than the one they had selected had confessed, a majority changed the identifications. Of those who had not made an initial identification, half subsequently "selected" the confessor, once his identity was revealed.

Demeanour Testimony Boosts the Impact of a Flawed Confession on Juries" (2007), cited in S. Kassin, "Confession Evidence: Commonsense Myths and Misconceptions" (2008), 35 Criminal Justice and Behavior 1309.
137. J.S. Neuschatz, D.S. Lawson, J.K. Swanner and C.A. Meissner, "The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making" (2008), 32 Law and Human Behavior 137.
138. S.M. Hasel and L.E. Kassin, "On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identifications? (2009), 20 Psychological Science 122.

This research has troubling implications for the admissions of guilt that arise during Mr. Big operations because of the means by which the admissions are elicited and the way in which this information is conveyed to the jurors. The recognition of coercion did not influence jurors' ultimate verdict decisions in the Kassin and Sukel study,[139] but coercion is not even apparent in a Mr. Big case. Rather, jurors may be confronted with an especially gripping confession where the lines between what is voluntary and involuntary can become blurred. Certainly nobody is waving a gun as was the case in the Kassin and Sukel study. The jurors see the accused on tape enthusiastically espousing the goals of organized crime and even bragging of murder. The confession may contain vivid and convincing details about the crime scene. The jury will also have heard one or more of the operatives promoting the importance of "honesty" to the defendant and the necessity of telling the truth at all times. The importance of truth, honesty and loyalty to the organization is a recurring theme during Mr. Big operations:[140]

> . . . activities were structured in such a way as to ensure that Teufel had lengthy one-on-one time with the accused so that he could repeat over and over this mantra of honesty, loyalty and integrity, of the fact that the organization had to know everything the accused had done and all of its details, that the organization did not care what it was he had done, and that if he were honest and loyal, he would have a lengthy and lucrative future in the organization.

Far less conspicuous to the jury is the duration of the sting and the numerous influential psychological pressures brought to bear on the defendant. The confession is *not* a statement against self-interest in the usual sense. On the contrary, the purpose of the statement is to convince the "boss" of the target's dependability. Typically, the boss is resolutely unreceptive to denials or exculpatory explanations. There are thus strong incentives (gang membership, esteem, money) to tell the boss what the boss clearly wants to hear, and a strong disincentive (violence, if not death) to displease him. The target knows or suspects that the boss will think he is lying if he denies

139. *Supra*, footnote 131.
140. *R. v. Mentuck*, *supra*, footnote 14, at para. 78.

culpability. Consequently, in the inverted moral universe that the operatives have created the confession *is* in the target's self-interest. It is most assuredly in his financial interest, not to mention concern for his own personal safety. He is motivated to lie to the "boss", and to lie convincingly.

At trial it is not unusual for the police and Crown to draw the court's attention to the frequency with which the suspect was admonished to tell the truth, the implication being that because this advice preceded the confession, the reliability of the latter is therefore enhanced. Here is a context, however, in which the meaning of "truth" has a shaky connection to its objective essence. An innocent suspect knows that without the boss's help he may be facing a long prison sentence. Because he has more reasons to confess falsely than he does to maintain his innocence, he is vulnerable to being manipulated into confessing and into pretending that the confession is the "truth". It is disingenuous to then transport this convoluted version of "truth" into court as if it had the same legal tender usually associated with the term "truth". Although it is the same word, we should not assume it has the same meaning at the trial[141] as it did in the gang's depraved and fictitious fantasy world.

Commenting on false confessions obtained by conventional interrogation practices, Kassin[142] characterizes some of them as "Hollywood productions". Many false confessions have features that jurors associate with credibility. Not only does the suspect make self-incriminating admissions, his account of the crime often contains precise details about the scene, weapons and the state of the victim — many, if not most of which are ultimately unconfirmable, generic or as attributable to external sources as personal experience. In addition, he may supply stirring testimony about his own emotional condition during and subsequent to the crime. Because the account is so richly nuanced and textured, it has the ring of authenticity. What jurors may not know is that much (or all) of the detail was made available to the suspect during the interrogation by means of

141. See, for example *Terrico*, *supra*, footnote 26; *Franz*, *supra*, footnote 24.
142. S.M. Kassin, "A Critical Appraisal of Modern Police Interrogations" in T. Williamson, ed., *Investigative Interviewing: Rights, Research, Regulation* (Devon, UK: Willan Publishing, 2006), pp. 207-28.

leading questions, photographs or newspaper accounts. The resulting narrative is not easily distinguished from one that is based on actual experience.

Expert opinion about the general phenomenon of false confessions, interrogation tactics, social influence etc. is amply supported "by a long history of basic psychology and a growing forensic research literature".[143] Kassin[144] and others have recommended a more active use of psychological science as a basis for expert testimony, amicus briefs,[145] and other forms of consultation. For example, in *U.S. v. Belyea*[146] the defendant confessed to the theft of a firearm after being terrified into thinking it had been used in a murder and that his fingerprints were on it. He moved to introduce expert opinion evidence on false confessions. The district court rejected the motion on the grounds that "Jurors [already] know people lie." The U.S. Court of Appeals for the Fourth Circuit subsequently overturned the conviction, noting that a more nuanced analysis of the proposed testimony was required:[147]

> Astutely, this Court argued that although jurors know in general that people lie, they may not know that certain people under certain conditions will be judged to be liars and then confess under interrogation to crimes they did not commit. In this Court's opinion, "The phenomenon of false confessions is counter-intuitive and is not necessarily explained by the general proposition that 'jurors know people lie'".

143. S. Kassin, "On the Psychology of Confessions: Does *Innocence* Put Innocents at Risk?" (2005), 60 American Psychologist 215 at p. 223; see also S.M. Fulero, "Expert Psychological Testimony on the Psychology of Interrogations and Confessions", in G.D. Lassiter, ed., *Interrogations, Confessions and Entrapment* (New York: Kluwer Academic, 2004), pp. 247-63. See also J. McMurtrie (2005), "The Role of the Social Sciences in Preventing Wrongful Convictions" (2005), 42 Am. Crim. L. Rev. 1271; S. Nadia, "When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony" (2005), 32 Am. J. Crim. L. 191.
144. *Supra*, footnote 142.
145. Cf. N. Gilfoyle and J.G. Cooney, Jr., Brief for *Amicus Curiae* in *Anthony Wright v. Commonwealth of Pennsylvania* (unreported, Supreme Court of Pennsylvania, Eastern District, E.D. Allocatur Docket 2008, No. 21, EAP 2008).
146. *United States v. Belyea* (unreported, U.S. Court of Appeals for the Fourth Circuit, October 28, 2005).
147. *Supra*, footnote 136, Kassin (2008), at p. 1319.

To evaluate people's ability to assess the truthfulness of a confession, Kassin, Meissner and Norwick[148] had both police investigators and college students view videotaped confessions of inmates' admissions of guilt to a crime. Half of the inmates' admissions were true narrative confessions to the crime for which they had been convicted, while the other half were concocted false confessions to a crime the inmate had not committed. (The inmates had been provided a skeletal sentence of a true crime they had not committed and asked to make up a confession.) The accuracy rates of neither the students nor the investigators exceeded chance, although the investigators actually had more confidence in their judgments. This study accords with others that, generally speaking, demonstrate that deceptiveness is not easily identified. Numerous studies conducted over many years and in various countries reveal that people perform at no better than chance levels when endeavouring to distinguish truth from deception.[149] This difficulty is exacerbated in Mr. Big operations where the jury is exposed to a 20-minute video of a "confession" that is the culmination of hundreds of hours of artifice, deceit and contrived interactions with the defendant. Typically, the state will have expended half a million dollars over an eight-month period to stage the conditions that elicit the confession. As we noted earlier, the attribution error biases jurors to concentrate on what the suspect ostensibly did and said. The inferred causes of the suspect's actions are likely to be dispositional in nature (*e.g.*, temperament, character, moral fibre) as opposed to situational. Jurors are inherently disinclined to consider the context, circumstances and the background events preceding the confession. Additionally, full details of the litany of

148. S.M. Kassin, C.A. Meissner and R.J. Norwick, "'I'd Know a False Confession if I Saw One': A Comparative Study of College Students and Police Investigators" (2005), 29 Law & Hum. Behav. 211.
149. C.F. Bond and B.M. De Paulo, "Accuracy of Deception Judgments" (2006), 10 Personality and Social Psychology Review 214; B.M. DePaulo, J. Lindsay, B.E. Malone, L. Muhlenbruck, K. Charlton and H. Cooper, "Cues to Deception" (2003), 129 Psychological Bulletin 74; K. Watkins and J. Turtle, "Investigative Interviewing and the Detection of Deception: Who Is Deceiving Whom? (Problems With Deception)", *Canadian Journal of Police and Security Services* (June 2003), p. 115.

orchestrated transactions may not even be disclosed to the defence much less made available to the jury.

There is a line of research that examines how evaluations of interrogation procedures can be shaped by the accuracy and detail of the account with which the decision-makers are supplied. For example, Lassiter and his colleagues[150] have revealed that judgments of the voluntariness of a videotaped confession are affected by the camera angle used. When videotaped confessions focused on the suspect — compared to a camera angle subtending both suspect and interrogator — jury-eligible individuals judged the confessions to be more voluntary and the suspects more likely to be guilty. As noted earlier, not all of the interactions from a Mr. Big procedure are electronically recorded. Situational pressures over the course of the protracted operation are not captured in the final video that conveys the confession. Moreover, the final video itself may be suspect-focused, inviting bias.

Undeniably, the Mr. Big procedure is successful in inducing genuine confessions, and there are numerous cases in which the confession was accompanied by narrative details that could only have been known by the perpetrator (*i.e.*, "guilty knowledge"). In one instance, the whereabouts of a previously undiscovered body were revealed. On the other hand, there are also numerous cases in which the confession does not go beyond the stark admission of responsibility. Without the "confession" in these latter cases, the police do not have substantive independent evidence implicating the target in the crime. Consequently, part of the assessment of reliability should contain an appraisal of the post-admission narrative.[151] How was the crime executed? Where? When? With whom? Does the confession provide investigators with forensic details

150. G.D. Lassiter, A.L. Geers, P.J. Munhall, I.M. Handley and M.J. Beers, "Videotaped Confessions: Is Guilt in the Eye of the Camera?" (2001), 33 Advances in Experimental Social Psychology 189; G.D. Lassiter, A.L. Geers, I.M. Handley, P.E. Weiland and P.J. Munhall, "Videotaped Confessions and Interrogations: A Change in Camera Perspective Alters Verdicts in Simulated Trials" (2002), 87 Journal of Applied Psychology 867; G.D. Lassiter, S.S. Diamond, H.C. Schmidt and J.K. Elek, "Evaluating Videotaped Confessions: Expertise Provides no Defense against the Camera-Perspective Effect" (2007), 18 Psychological Science 224.

151. Ofshe and Leo (1997), *supra*, footnote 12.

that were not already known or that could lead to new evidence? Is the corroborating evidence accurate, and was it not otherwise available from news accounts or from the investigators themselves? Kyle Unger, for example, told an undercover operative that he had killed his victim near a bridge. He took the operative to the bridge to show him the location. The bridge had not even been built at the time of the murder.[152] Despite a dearth of independent confirmation, confessions alone are often enough to persuade juries to convict.

In the course of examining the potential of certain "Reid technique" interrogation tactics to induce false confessions, Russano, *et al.*[153] introduced the notion of "diagnosticity". A procedure has useful diagnosticity to the extent that it increases the ratio of true to false confessions. They found that diagnosticity was highest when no Reid tactics were used (46% of guilty suspects confessed vs. only 6% of innocents) and worst when both minimization and maximization strategies were employed. In the latter instance, true confessions increased by 35% but at a cost, namely *a seven-fold increase* in false confessions. These researchers had the luxury of being able to identify and isolate specific interrogation practices,[154] which could then be tested under controlled conditions in an ethically appropriate manner. In the Mr. Big situation, we are obliged to guess at the tactics and their rationale, but even if the tactics were explicitly revealed, the intrusive and deceitful nature of their operation would preclude any ethical simulation of the exercise. Consequently the diagnosticity of the Mr. Big procedure is unknown. Considering the lack of thorough documentation that characterizes a Mr. Big operation, it is doubtful if diagnosticity could *ever* be established. Because of the absence of a complete record, sometimes hours of interactions between the target and the operatives are reduced to a page or two of notes that may have been composed days after the events being reported. "Unrelated general conversation" is a frequent notation. "Unrelated"

152. *R. v. Unger*, *supra*, footnote 8, at para. 19.

153. M.B. Russano, C.A. Meissner, F.M. Narchet and S.M. Kassin, "Investigating True and False Confessions within a Novel Experimental Paradigm" (2005), 16 Psychological Science 481.

154. *Supra*, footnote 23.

according to whom? Statements (or threats or enticements) that the defence psychologists might consider to be of some relevance might not be so acknowledged by the operatives. Consequently, not only do these exchanges not show up in any record, they are not recognized to be important in the first place and are thus lost forever.

(3) Record-Keeping

In *R. v. Oickle*[155] the Supreme Court strongly supported the growing practice of videotaping interrogations. Indeed, the court relied on the videotape when concluding that the police conduct had not been oppressive. Great Britain and several states in the United States have mandatory videotaping requirements. A Federal Provincial Territorial Heads of Prosecutions Committee established a Working Group on the Prevention of Miscarriages of Justice in Canada. Their 2004 report recommended to prosecutors and police investigators that "Custodial interviews of a suspect at a police facility . . . should be video recorded. The video recording *should not be confined to a final statement made by the suspect, but should include the entire interview*."[156] In a Mr. Big operation there are many hours of exchanges prior to the "confession" that is presented to the jury, but not all of it is electronically recorded.[157] In at least one Mr. Big operation the *only* recorded interaction was the final encounter with the "big boss".[158]

Even if this "in custody" recommendation had legal force, it would not obligate the police to maintain audio or videotaped records during Mr. Big operations because the target is not in custody. Consequently, a full and accurate record of all the transactions is not (and cannot be) made available. There can be little doubt that an electronic record permits the courts to make more informed judgments about whether interrogation

155. *R v. Oickle*, *supra*, footnote 12.
156. Report on the Prevention of Miscarriages of Justice (2004) (emphasis added). Available in its entirety on the Internet at: <http://canada.justice.gc.ca/eng/dept-min/pub/pmj-pej/pmj-pej.pdf>.
157. As a result of the Supreme Court of Canada's judgment in *Duarte*, *supra*, footnote 90, such electronic recording would be prohibited in the absence of prior judicial authorization.
158. *R. v. Osmar*, *supra*, footnote 8.

tactics may have elicited an unreliable confession.[159] A court has no such luxury in Mr. Big cases. The police prepare reports based on their notes or memories of exchanges with the target, but these written summaries are inevitably subject to a number of distortions, omissions and biases.[160]

Michael Lamb and his colleagues examined the ability of experienced interviewers to provide accurate accounts of interviews with children. In this study, the interviews were of a forensic nature, and the interviewers took verbatim notes during the course of the interview. How faithfully did the notes reflect what actually went on? To answer this question, the notes were compared to transcripts obtained from electronic recordings. There was an underreporting of both the details provided by the children *and* the interviewers' utterances. Errors in the notes that contradicted the audio recording were rare; however, the interview structure was inaccurately represented. Details provided by the children were systematically misattributed to more open-ended rather than focused questions. In other words, answers to leading questions were recorded as if they were unprompted responses.

In another study, Peter Calamai looked at the accuracy of direct quotes used by journalists covering the Colin Thatcher trial in 1984. Many journalists attended the trial and published daily accounts of the court proceedings in their respective newspapers. The various newspaper accounts were compared to the court transcript. What were supposed to have been direct quotations of witnesses, counsel and judge differed from journalist to journalist, and the discrepancies often revealed major distortions of meaning. For example, at one point during the trial, Thatcher engaged in a heated exchange with Crown prosecutor Serge Kugawa. The Toronto Sun described Thatcher shouting "It's very easy to say my sons have lied.

159. *Supra*, footnote 142.
160. P. Calamai, "Discrepancies in news quotes from the Colin Thatcher trial" in N. Russell, ed., *Trials and tribulations* (Monograph #1, School of Journalism and Communication, University of Regina, 1985); M. Lamb, Y. Orbach, K. Sternberg, I. Hershkowitz and D. Horowitz, "Accuracy of investigators' verbatim notes of their forensic interviews with alleged child abuse victims" (2000), 24 Law & Hum. Behav. 699; D. Dixon and G. Travis, *Interrogating Images: Audio-visually Recorded Police Questioning of Suspects* (Sydney: Institute of Criminology, 2007).

Why don't you step out on the court house steps and say that?" Was Thatcher challenging Kugawa to a fight? One could certainly be forgiven for making such an inference, but not if the omitted five words are included: "Why don't you step out on the court house steps and say that, where you don't have immunity?" In the few seconds that it takes a note-taker to decide on the importance of a statement, retrieve it from short-term memory and write it down, a certain amount of editing takes place. Phrases are altered; words are omitted. While many of the discrepancies were innocuous, others were quite serious. These errors occurred when the written account was contemporaneous with the utterance. When police reports are based on memories of day-old conversations they may be highly selective and incomplete. There is no substitute for an electronic record. Not only is the Mr. Big procedure unique in its reliance on highly manipulative tactics, but it is inoculated against the scrutiny usually afforded custodial confessions.

(4) Ethical Concerns

In a research context, investigators must not allow any physical harm to befall research participants. Ethical approval would be denied to any study that posed an obvious risk of physical danger, but it is not always easy to anticipate future perils. Consider "field studies" in social psychology that are designed to determine the conditions under which people can be induced to jaywalk. A well-dressed jaywalker (a confederate of the researcher) will elicit more imitation than a poorly dressed control model, and two models will elicit more imitation than one.[161] In these studies, ethical approval was not given because none was sought. Should it have been? What if the people who had been subtly encouraged to jaywalk (when they would not otherwise have done so) did so again on other occasions, perhaps because they thought it was more normative than it really was, or because it saved them some time? Suppose further that one or more of them were struck by a car? Does the

161. M. Lefkowitz, R.R. Blake and J. Mouton, "Status Factors in Pedestrian Violation of Traffic Signals" (1955), 51 Journal of Abnormal Psychology 704; J.C. Russell, D.O. Wilson and J.F. Jenkins, "Informational Properties of Jaywalking Models as Determinants of Imitated Jaywalking: An Extension to Model Sex, Race and Number" (1976), 39 Sociometry 270.

researcher have some responsibility? Today, most ethics review boards would probably deny approval to such studies because participants must be protected from the risk of physical harm.[162] Future emotional harm, however, is more difficult to assess. Milgram[163] was heavily criticized for having exposed his research recruits to potentially disturbing information, namely the self-revelation on their part that they had behaved in a manner discrepant with their own moral principles. In response, he presented follow-up data that appeared to demonstrate that there had been no long-term damage, although not all critics were convinced.[164] Despite his assurances, the psychological research community reacted by enacting strong ethical rules to protect research participants from potential psychological injury at the hands of well-meaning researchers.

Contrast the above ethical controversy to the procedures and outcomes in a Mr. Big operation. The target is essentially socialized into a life of crime. The state rigs situations where criminal acts are encouraged and reinforced. Outcomes are lucrative, with little or no risk to the target. These contrived scenarios are re-enacted with minor variations over and over again, sometimes for as long as two years. In some cases the operatives also become good friends of the target. As such, they are effective role models. The target learns to be a criminal. Many suspects had not, heretofore, engaged in any criminality, but the routine reinforcement and systematic cultivation of illegal activities may well affect the target's self image and psychological makeup. In the course of recruiting the target into the criminal gang, the operatives expend considerable energy on bonding and rapport building with the target. An important goal is to convince the suspect that the organization is credible, powerful and ruthless. In order to impress the target with his own savagery, an operative may confess to a murder that he himself committed. The operative spares no effort to make his depravity convincing. If and when the target

162. J.E. Alcock, D.W. Carment, S.W. Sadava, *A Textbook of Social Psychology* (Toronto: Prentice- Hall, 2005).
163. *Supra*, footnote 120.
164. D. Baumrind, "Research Using Intentional Deception: Ethical Issues Revisited" (1985), 40 American Psychologist 165.

ultimately "confesses" to the murder for which he is a suspect, is he "confessing" or is he attempting to persuade his friend(s) that he too is capable of extreme violence? He too wants to be believed and he too may spare no effort to make his own wickedness persuasive.[165]

Mr. Big strategists sometimes devise extraordinary ploys to intimidate the target(s), and to establish or enhance the "credibility" of the gang and its operatives. For example, during a staged scenario, the target was directed to go into a casino and lure a gay male (an operative) to a motel room for a homosexual tryst. Once there, he was badly beaten because of an outstanding debt while the target acted as a lookout. Real blood was splashed onto the motel room walls to make the beating appear realistic.[166] On another occasion two targets were hired to accompany the "boss" to a remote area 250 km away in order to dig two graves, the purpose of which was left ambiguous. The targets were riding separately in their own vehicle, which was wired with recording hardware. During the return trip they wondered aloud if they had been digging their own graves.[167] The ultimate "confession" from one of these targets was delivered to the same "boss" (an RCMP operative) that had directed the grave digging. In a third instance the target was taken to a trailer where he was instructed to assist in kidnapping a male (an operative) who had ostensibly been lured there by a prostitute (another operative). The target sees the prostitute providing (simulated) oral sex to the kidnapping victim, who is then tied up, blindfolded, taken to another location and tortured. In a sequel to this scenario (*i.e.*, the next day), the kidnapped male was portrayed to the target in shackles and appearing to have been severely tortured and sodomized.[168] With unlimited resources, it is possible to create a very credible fantasy world, but should it surprise us that what

165. Deceit weaves a tangled web. Kassin has noted that "across the 100-plus-year history of basic psychology, the general point is clear: Misinformation renders people vulnerable to manipulation from a host of influences", *supra*, footnote 136, at p. 1314.

166. *Supra*, footnote 121, at pp. 663-65.

167. *R. v. Anderson*, trial *voir dire* held in the Provincial Court of Alberta before A.D. Macleod J., April 6-17, 2009.

168. *Ibid.*

might subsequently be forthcoming from those seduced into that world might also be "fantasy"?

The exercise can be likened to a vast, intricate and uncontrolled experiment. The Mr. Big method has not been the subject of direct experimental study of its capacity to elicit false confessions. For obvious ethical reasons, it never could be. It is specious for proponents to argue that, absent disconfirming evidence, confessions arising from the technique should be considered reliable. Requiring direct empirical counterevidence bearing on its diagnosticity is to set the bar so high it could never be hurdled.[169] *Kakegamic*[170] provides a rare insight into the inherent unreliability of the procedure. In this case, undercover operations were apparently conducted on two different suspects in the same murder. Both confessed, and both reported having acted alone. Patrick Fischer confessed to having committed two murders, one of which was a complete fabrication. Timothy Osmar was convicted of two murders, largely on the basis of "confessions". His versions of how the killings had taken place contained improbable or incorrect elements and omitted details that the actual killer would certainly have known. These examples should give us pause. The impossibility of setting up an ethical experiment that replicates the effects of Mr. Big is itself a commentary on this extraordinarily manipulative technique. It is, therefore, appropriate for psychologists to reason by analogy and experience, where they cannot ethically conduct direct experiments. The inability to do a proper experiment should in no sense disqualify psychology from making a contribution to the issue.

Throughout the Mr. Big operation, the target is innocent in the eyes of the law. The sting goes on for many months. Regardless of whether charges are ultimately laid, let alone

169. Viewing the Mr. Big technique as an uncontrolled experiment on the target, the absence of evidence of its diagnosticity renders it an unproven novel scientific technique. Rather than this resulting in the exclusion from evidence of the product of the technique (cf. *R. v. Trochym*, [2007] 1 S.C.R. 239, 216 C.C.C. (3d) 225, 43 C.R. (6th) 217), the lack of evidence of diagnosticity has instead immunized the technique against expert criticism before the trier of fact.

170. Kakegamic trial (2005). "Police informant was second suspect", *Kenora Daily Miner and News* (Friday, October 7, 2005).

whether there are convictions, the degree of intrusion is unprecedented. The experience is indisputably life-altering and quite possibly, devastating. There is no debriefing. The target learns, after the fact, that agents of his own government tricked him into becoming a criminal and then used it against him. How would someone recover from this revelation? Arguably, they might not. Without knowing anything about the diagnosticity of the procedure, is it acceptable for the state to surreptitiously set in motion a covert intervention that may permanently redirect the suspect's life trajectory, all in the service of extracting a "confession" to a crime that the suspect may (or may not) have committed? Would this "shock the conscience of the community"? As we noted above in Part 3(1)(c), nothing that has so far come to light during Mr. Big operations has provoked a sufficient degree of judicial offence to admit a challenge under the "shocking the conscience" rubric.

How would the general public react to the knowledge that police operatives were engaging in abortion counselling during the course of an undercover Mr. Big operation? Suppose the target informed his friend and boss (an RCMP operative) that his wife was pregnant but that they were ambivalent about keeping the baby because of financial difficulties. The target was also concerned that a new child would interfere with his work with the criminal organization. Suppose he was instructed *not* to abort the child due to his work-related worries, and further informed that he would soon be making lots of money. When the target expressed surprise at this reaction, he was told that the bosses regarded family as very important, and that the target should consider how he would feel five years later with (or without) a child. Suppose that at the time that the undercover operative was dispensing this advice, he was fully aware that the target would soon be charged with first degree murder, and if convicted, would be sentenced to life in prison. The police are not engaged in academic research, but rather are (potentially) pursuing dangerous criminals; nonetheless, there appear to be numerous Mr. Big tactics that raise "infringement" issues under s. 7 of the Charter (see Section 3(1)(f)). Surely abortion counselling is an exemplar.

5. Conclusions and Recommendations

There is no shortage of examples of DNA-exonerated innocent defendants who had confessed when interrogated prior to their trials. Consequently, there have been numerous calls for reform of current methods of custodial interrogation practices. Nobody would deny that the optimal procedure is one that secures confessions from guilty perpetrators but not from innocent suspects. Two frequently mentioned recommendations for reform are: (1) reduce or eliminate the reliance on false evidence and trickery, and (2) videotape all interviews and interrogations in their entirety.[171]

The Mr. Big procedure is a fundamentally deceitful exercise. Much of what transpires during a Mr. Big sting is not reliably documented. Unless and until it is subjected to the same degree of critical scrutiny as custodial interrogations, the risk of false confessions will remain worrisomely high. Mr. Big may elicit "true" confessions but by its very nature it also has the potential to induce individuals — because of avarice, fear or a wish to impress — to produce false confessions. A procedure that is capable of both exposing the guilty and trapping the innocent needs to be approached with extreme caution.[172]

In *Osmar*,[173] the Ontario Court of Appeal upheld the exclusion of expert evidence relating to the risk of false confessions in Mr. Big cases. Rosenberg J.A. held that the proposed evidence would not have been of assistance to the jury. The British Columbia Court of Appeal reached a similar conclusion in *Bonisteel*.[174] It should be noted that, in both *Osmar* and *Bonisteel*, the proposed expert evidence was based upon studies of false confessions in traditional police interrogations, rather than being based in the risk of false confession associated with the Mr. Big investigative technique.

171. M. Costanzo and R.A. Leo, "Research and Expert Testimony on Interrogations and Confessions" in M. Costanzo, D. Krauss and K. Pezdek, eds., *Expert Psychological Testimony for the Courts* (Mahwah, NJ: Erlbaum, 2007); Kassin, *supra*, footnote 143; R. Leo, *Police Interrogation and American Justice* (Cambridge: Harvard University Press, 2008).

172. As one of the Mr. Big operatives in a trial in Calgary recently told the court: " . . . pretty much anyone is vulnerable . . . the technique could be used on anyone": *supra*, footnote 121, p. 620.

173. *Supra*, footnote 8.

174. *Supra*, footnote 26.

The false confession research in the interrogation context is based upon a substantial body of demonstrated false confessions from investigations in the United States. It is quite unlikely, however, that similar research could be conducted specifically in the context of Mr. Big investigations. Any scientific analysis into the causes of false Mr. Big confessions would require a sufficient sample of "proven false confessions". There are several reasons why it can be anticipated that the number of such "proven false confessions" will be small:

(1) The technique is frequently used in cases where there is no meaningful forensic identification evidence. As such, the possibility of demonstrating innocence through scientific testing is low.
(2) The cost of the technique means that it is utilized much less frequently than techniques such as interrogation.
(3) The technique is not used in the United States, so research cannot benefit from the larger population from which to draw samples.

As well, as outlined above, ethical limitations would prevent researchers from meaningfully simulating the Mr. Big technique in experimental studies. Despite these inherent limitations in studying the technique, psychologists can still be of assistance to the courts by identifying the powerful psychological manipulations that are at play during a Mr. Big operation and that pose a material risk of false confessions from virtually anyone unfortunate enough to become entangled in a Mr. Big web.[175]

We hope that judicial recognition of the dangers inherent in this technique will lead to the development of evidentiary rules to restrict the admissibility of confessions obtained through at least the more extreme examples of the technique. In addition, we have the following recommendations:

(1) *Recording*: In order to allow for a proper assessment of the context of a Mr. Big confession, it is imperative that as full a recording as possible exist of all of the

175. See the postscript to this article, *infra*.

preliminary scenarios in the operation. From the outset of the sting, police should be required to audiotape as much of their interactions with the target as is practicable. In light of the Supreme Court of Canada's decision in *Duarte*, however, police are precluded from surreptitiously recording conversations in the absence of prior judicial authorization on reasonable grounds. Thus, requiring the recording of the early stages of the sting could only be meaningfully achieved if courts were to conclude that, in light to the effect of this invasive technique on the expectation of privacy and security interest of the target, police could only resort to the Mr. Big technique under judicial authorization.[176]

(2) *Disclosure of Manuals and Procedures*: In order to allow for the proper study of the technique, training or procedure manuals with respect to the technique should be made available to researchers. In addition, researchers would benefit from access to information relating to "unsuccessful" Mr. Big stings (*i.e.* investigations that did not result in the obtaining of a confession) or stings where the resulting confession did not result in the laying of a criminal charge due to its apparent unreliability.[177] Efforts to obtain information relating to the technique could be pursued through the criminal law disclosure process or through freedom of information applications. It can be anticipated, however, that disclosure of such information will be resisted by the police and the Crown.[178]

(3) *Expert Evidence*: Notwithstanding the judgments in *Osmar*, *Bonisteel* and *Terrico*, counsel should continue to make efforts to adduce expert evidence on the potential effect of the technique on the target. Current jurisprudence suggests that courts will not be receptive to opinion evidence relating to the ultimate reliability of

176. *Supra*, section 3(1)(f).
177. Cf. *Kakegamic*, *supra*, footnote 170, where the police obtained Mr. Big confessions from two separate individuals but considered one of them to be unreliable and untrue.
178. Indeed in *Mentuck*, *supra*, footnote 14, the Crown sought to maintain a permanent publication ban on the very nature of the technique.

a confession obtained using the technique,[179] and may not allow an expert to draw solely upon the false confession research arising from the interrogation context. However, the anticipated impact on the target of a prolonged and invasive Mr. Big operation may be considered to be sufficiently outside the experience of jurors so as to require the assistance of expert testimony in order to properly contextualize the purported confession.[180] Counsel should also consider obtaining a psychological assessment of the accused person with a view to adducing evidence of his or her particular vulnerability to the technique.[181]

(4) *Judge-alone Trials*: As argued above, due to the very nature of the technique, the admission of a Mr. Big confession will result in substantial bad character evidence relating to the accused being heard by the trier of fact. Although evidence of this nature has traditionally been viewed by the courts as potentially prejudicial to a fair trial, it is routinely admitted in Mr. Big cases. Even strong limiting instructions may not prevent such evidence from subtly affecting jurors' consideration of evidence relating to the reliability of the purported confession. In cases (such as a murder case) where the accused has no as-of-right election as to the mode of trial, defence counsel should consider seeking the Crown's consent to have a judge-alone trial and, in appropriate cases, bring applications to override improperly withheld Crown consent to dispense with a jury.

(5) *Jury Instructions*: In those cases that proceed before a jury, defence counsel should request that the trial judge instruct the jury that (a) false confessions have led to significant miscarriages of justice in the past; (b) statements obtained through violence, threats of violence or other substantial coercion should be given little if any weight;[182] (c) the jury should focus on the

179. *R. v. Phillion* (2009), 241 C.C.C. (3d) 193 *sub nom. Reference re: Phillion*, 65 C.R. (6th) 255 (Ont. C.A.)
180. *Osmar*, *supra*, footnote 8.
181. *Ibid.*
182. See *Hodgson*, *supra*, footnote 33, at para. 30.

consistency or inconsistency of the purported confession to the known facts surrounding the offence, including whether the statement contains material details that were not publicly available, were not the subject of tainting by contact with the police, and would only have been known to the perpetrator.[183]

Postscript

In 1992 Kyle Unger was convicted of the sexual assault and killing of 16-year-old Brigitte Grenier. The conviction was based, in part, on (a) a confession elicited by means of a Mr. Big operation, and (b) a strand of hair found at the crime scene. His initial appeal to the Manitoba Court of Appeal following his conviction was rejected and leave to appeal to the Supreme Court of Canada was denied. Unger spent the next 14 years in prison. In September 2004, a forensic evidence review committee called into question the hair comparison evidence used at the trial. DNA testing showed no trace of Unger on any of the exhibits and could not link him to the crime scene. He was released on bail on November 24, 2005 pending ministerial review of his case. After innumerable delays murder charges against him were dropped on October 23, 2009 after the Crown determined it did not have enough evidence to retry him. Within hours of Unger's acquittal, Manitoba Justice Minister Dave Chomiak announced that the province would not be offering any compensation for the wrongful conviction because it was Unger's confession that resulted in the conviction in the first place.

183. Cf. the post-confession forensic analyses recommended by Ofshe and Leo, *supra*, footnote 12.