

Mr Big Operations: Innovative Investigative Technique or Threat to Justice?

Justice Susan Glazebrook DNZM¹

Introduction

The “Mr Big” technique² originated³ in Canada around the early 1990’s.⁴ The operations vary because they are tailored to the particular situation but there are common design features. The target is a person suspected of a crime and, because of the expense involved in Mr Big operations, usually a very serious crime. There is (or is perceived to be) insufficient evidence to bring the person to trial. The aim of the Mr Big operation is to secure a confession.

The operation often begins with what appears to be a chance encounter between the suspect and an undercover officer.⁵ A relationship is developed between the two, leading to the suspect being given the opportunity to become involved in a criminal organisation to which the undercover officer supposedly belongs. The suspect takes part in a number of criminal activities⁶ (scenarios), often starting with what may appear to be on the border of legality (for example, debt collecting) but gradually escalating in apparent seriousness. The suspect will

¹ Judge of the Supreme Court of New Zealand. I am grateful to my clerk, Andrew Row, for his invaluable assistance with this paper. The paper was prepared for the Judicial Colloquium 2015, 22–26 September 2015, Hong Kong. Participating jurisdictions: Australia, Canada, Hong Kong and New Zealand. The views expressed are my own and do not necessarily represent those of the New Zealand Supreme Court.

² The colloquial name. The Royal Canadian Mounted Police call it the “major crime homicide technique”: see British Columbia Royal Canadian Mounted Police “Undercover Operations” <www.bc.rcmp-grc.gc.ca>. In New Zealand, it is formally referred to by the police as the “Crime Scenario Undercover Technique (CSUT)”.

³ It may be more accurate to say that the technique was resurrected. The first reported Mr Big operation in Canada, although not called that, was in 1901 in Manitoba: *The King v Todd* (1901) 4 CCC 514 (Man KB). In that case, Dubuc J described the evidence gathering operation as “vile”, “base” and “contemptible” at [3] and [8]. The Court ultimately decided that the evidence was admissible, given that it was not excluded under the “voluntariness rule”.

⁴ It has been suggested that it is perhaps not coincidental that resort to this technique began around the time of the Supreme Court of Canada’s decisions in *R v Hebert* [1990] 2 SCR 151 and *R v Broyles* [1991] 3 SCR 595 which set clear limits on the use of undercover investigative techniques against persons in custody: TE Moore, P Copeland and RA Schuller “Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the ‘Mr. Big’ Strategy” (2010) 55 Crim LQ 348 at 350.

⁵ An extreme example occurred in the Netherlands where the Mr Big-type operation began by an undercover officer crashing into the suspect’s car so that the undercover officer could strike up a conversation and friendship with the suspect: see “Controversial murder confession ‘worthless’ experts say” (15 July 2015) Dutch News <www.dutchnews.nl>.

⁶ All of the conduct is staged by undercover police officers and none is in fact criminal.

be paid for the work undertaken and there will be the promise of further or more lucrative work if he or she is fully accepted into the organisation.

The operation culminates in an interview with the purported boss of the organisation (Mr Big). The suspect understands that succeeding in this interview will lead to progression within the organisation. The interview is designed to extract a confession, sometimes using an interview style that would not be acceptable in a formal police interview.⁷

At some stage, prior to the Mr Big interview, the suspect will have learned that the formal police investigation into his or her prior criminal activity has been activated or re-activated.⁸ The suspect will, however, have been led to believe that the organisation can help make any charges relating to that past criminal activity disappear (often being shown tangible evidence of other cases where that has occurred).⁹ The assistance will be contingent on the suspect, in the Mr Big interview, meeting the organisation's values of trust, honesty and loyalty. These values have been stressed throughout the operation, in some cases reinforced by alleged lies on the part of other members being met by violence.¹⁰

As at 2008, the Mr Big technique had been used more than 350 times across Canada.¹¹ In 75 per cent of these operations the person of interest was either cleared of, or charged with, the offence.¹² Of the cases prosecuted, in excess of 95 per cent resulted in convictions.¹³ The scale of the operations has varied but in one operation more than 50 police officers were involved¹⁴ and in another 63 "scenarios" were played out.¹⁵ Several operations in Canada are

⁷ See for example in *Tofilau v The Queen* [2007] HCA 39, (2007) 231 CLR 396 at [396] where Callinan, Heydon and Crennan JJ noted that the trial Judge said that, in his discussion with the "boss", one of the appellants, Mr Clarke, was "hectorred and harangued to a significant degree, in a manner which would be unacceptable in a formal police interview".

⁸ And, even in some cases, that charges are imminent.

⁹ In some cases the suspect has been told that the organisation can arrange for a person with a terminal illness to take responsibility for the offence but that the suspect must give accurate details so that the dying person could tell a convincing story to the authorities: see for example, *R v Fliss* 2000 BCCA 347, 145 CCC (3d) 353; and *Dix v Canada (Attorney-General)* 2002 ABQB 580, [2003] 1 WWR 436.

¹⁰ See for example the case of *R v Terrico* 2005 BCCA 361, (2005) 199 CCC (3d) 126, discussed further below.

¹¹ British Columbia Royal Canadian Mounted Police, above n 2.

¹² British Columbia Royal Canadian Mounted Police "Undercover Operations – Questions and Answers" <bc.rcmp-grc.gc.ca>. The Royal Canadian Mounted Police do not specify the proportion of those that are cleared and those that are charged.

¹³ British Columbia Royal Canadian Mounted Police, above n 12. I have been unable to find more up-to-date figures.

¹⁴ See *Dix v Canada (Attorney-General)*, above n 9. The operation in *Dix* cost a total of \$137,000 (excluding salaries and overtime pay) and lasted thirteen months: see K T Keenan and J Brockman *Mr. Big: Exposing Undercover Investigations in Canada* (Fernwood Publishing, Winnipeg, 2010).

¹⁵ See *R v Hart* 2014 SCC 52, [2014] 2 SCR 544 at [38].

reported to have cost over \$1 million CAD with the highest reportedly costing approximately \$4 million CAD.¹⁶ The Mr Big technique has been used in Australia¹⁷ and New Zealand.¹⁸ It does not appear that the technique has been used in Hong Kong.¹⁹

Mr Big in court

Canada

In Canada, a confession made out of court by an accused to a person in authority is inadmissible unless the Court is satisfied beyond reasonable doubt that the statement was made freely and voluntarily.²⁰ For it to be voluntary, among other requirements, it must be free of inducement by threats or promises made by a person in authority.²¹ A person in authority is a person formally engaged in the arrest, detention, examination or prosecution of the accused.²² With regard to the Mr Big technique, it has been held that, as there is no awareness or perception on the part of the suspect that he or she is speaking to a person in authority, the voluntariness rule does not apply.²³ The Mr Big technique has also been held

¹⁶ Keenan and Brockman, above n 14, at 23–24.

¹⁷ See for example *Tofilau v The Queen*, above n 7, where the technique was used in Victoria and *R v Cowan* [2013] QSC 337 where the technique was used in Queensland.

¹⁸ See for example *R v Cameron* [2007] NZCA 564 (pre-trial); and *R v Cameron* [2009] NZCA 87 (post-trial).

¹⁹ According to the British Columbia Royal Canadian Mounted Police, it is also used in other jurisdictions such as South Africa and other European countries: see British Columbia Royal Canadian Mounted Police, above n 12. It also appears that the Mr Big technique has been used successfully in the Netherlands: see above at n 5. There are conflicting views on whether the technique is used in the United States. The Royal Canadian Mounted Police say that it is: British Columbia Royal Canadian Mounted Police, above n 12. In *State v Rafay* 285 P3d83 (Wash App Div 1, 2012), a confession from a Mr Big operation conducted in Canada was admitted in evidence. See also the case of *State v Albrecht* 516 NW2d 776 (Wis App, 1994) which involved a Mr Big-type undercover operation in the State of Wisconsin. The confession obtained was held to have been voluntarily made and was admitted. These are the only examples of cases involving Mr Big operations in the United States that I have found. Most commentators say that the technique is not used in the United States but without explaining in any detail why that is the case: see for example Caroline Law “The Law on Mr. Big Confessions” (23 July 2015) University of Calgary Faculty of Law <www.ablawg.ca>. I note that the voluntariness rule may be wider in the United States than in Canada and Australia and that it may not need a person in authority: see *State v Rafay* at n 21. This may restrict the use of the technique. The fact that prosecutors are often involved at the investigatory stage may also inhibit the use of the technique – see, the American Bar Association, standard 2.3 of the “Standards on Prosecutorial Investigations”. There are also ethical rules restricting approaching suspects who are legally represented: see David Craig “The right to silence and undercover operations” *Platypus Magazine – the official journal of the Australian Federal Police* (September 2001) 34 at 34–35.

²⁰ See *R v Hodgson* [1998] 2 SCR 449 at [12].

²¹ In addition, it cannot be the result of oppression and must be the result of what the Courts call an “operating mind”: see further *R v Oickle* 2000 SCC 38, [2000] 2 SCR 3 at [48]–[63].

²² The term “person in authority” also includes persons the accused reasonably believes are acting on behalf of the police or prosecuting authorities and could therefore influence or control the proceedings against him or her: *R v Hodgson*, above n 20, at [48].

²³ See *R v Grandinetti* 2005 SCC 5, [2005] 1 SCR 27 at [44] where the Court said, “[w]hen, as in this case, the accused confesses to an undercover officer he thinks can influence his murder investigation by

not to engage the right to silence in the Canadian Charter of Rights and Freedoms²⁴ and the associated right to counsel. This is because the suspect is not detained by the police at the time of the confession. Thus the prohibition of active elicitation of a confession, set out in *Hebert*, does not apply.²⁵ Confessions obtained through the Mr Big technique have not usually been excluded on other grounds, such as abuse of process.²⁶

In *Hart* the Canadian Supreme Court re-assessed the law relating to Mr Big operations, discussing the hazards with the technique and, in particular, the possibility of unreliable confessions.²⁷ Also of concern were the risk of Mr Big operations becoming abusive²⁸ and the credibility hurdles created by the fact that the suspect willingly engaged in what appeared to be a criminal enterprise.²⁹ The current protections were not seen as adequate to meet these risks. The Court therefore set out a “two-pronged” approach to admissibility.³⁰

Under the first part of the new approach, confessions obtained through the Mr Big technique are presumptively inadmissible.³¹ The Crown can, however, prove on the balance of probabilities that the probative value of the confession outweighs its prejudicial effect.³² The probative value of the evidence relates to its reliability, which encompasses an inquiry both into the circumstances in which the confession was made and a consideration of any other

enlisting corrupt police officers, the state’s coercive power is not engaged. The statements, therefore, were not made to a person in authority.”

²⁴ The right to silence has been derived from s 7 of the Charter.

²⁵ Broadly, *R v Hebert*, above n 4, involved an accused placed in a cell with an undercover police officer posing as another suspect. During the conversation with the undercover officer, the accused made various incriminating statements. These were excluded as having been actively elicited in breach of the right to silence and the right to counsel.

²⁶ For example, in the case of *R v Bonisteel* 2008 BCCA 344, (2008) 236 CCC (3d) 170, the accused overheard, and witnessed the “aftermath” of a staged beating of an undercover officer who had supposedly lied to the group. The British Columbia Court of Appeal held in *Bonisteel* at [92] that the conduct of the police would not “shock the community” and therefore was not an abuse of process.

²⁷ *R v Hart*, above n 15, at [6] per McLachlin CJ, Lebel, Abella, Moldaver and Wagner JJ.

²⁸ At [9].

²⁹ At [7].

³⁰ At [84]–[89] per McLachlin CJ and Lebel, Abella, Moldaver and Wagner JJ. Cromwell J agreed with the majority’s new test at [152] but disagreed with the majority as to the application of that test to the facts before the Court. Karakatsanis J dissented and held that a new approach was not required and that the principle against self-incrimination, under s 7 of the Charter, would provide a comprehensive and flexible protection to deal with the concerns raised by the Mr Big technique: see at [168].

³¹ At [85].

³² Prior to *R v Hart*, above n 15, there had only been one case in which a confession had been excluded on the basis that its prejudicial effect exceeded its probative value: *R v Creek* 1998 CanLII 3209 (BCSC). This is mentioned by the majority in *R v Hart*, above n 15, at [65].

markers of its reliability.³³ The prejudicial effect stems from the harmful character evidence that accompanies its admission.³⁴

The second part of the new *Hart* approach is for judges to scrutinise the conduct of the police to determine if an abuse of process has occurred.³⁵ There are inherent limits on the power of the state to manipulate people for the purpose of obtaining convictions.³⁶ The Court said that, where the technique approximates coercion and overcomes the will of the accused, it will almost certainly amount to an abuse of process.³⁷ Physical violence or threats of physical violence are examples of coercive police tactics.³⁸ Taking advantage of the vulnerabilities of a suspect will also likely be unacceptable.³⁹

In applying the new approach to the case at hand, the Supreme Court held the probative value of Mr Hart's confession did not outweigh the prejudicial effect.⁴⁰ Given the "transformative effect" of the operations on Mr Hart's life,⁴¹ the majority said the "financial and social inducements provided [Mr Hart] with an overwhelming incentive to confess – either truthfully or falsely". In addition, there were internal contradictions in the confession and a lack of corroborating or confirmatory evidence. The Court held that the reliability of the confession was left in serious doubt.⁴² Given the findings on the first part of the new test, the majority did not need to consider whether there was also an abuse of process.⁴³

³³ *R v Hart*, above n 15, at [100]–[104]. At [105], the majority of the Supreme Court said that, in considering markers of reliability, trial judges should "consider the level of detail contained in the confession, whether it leads to the discovery of additional evidence, whether it identifies any elements of the crime that had not been made public (eg the murder weapon), or whether it accurately describes mundane details of the crime the accused would not likely have known had he not committed it (eg the presence or absence of particular objects at the crime scene). Confirmatory evidence is not a hard and fast requirement, but where it exists, it can provide a powerful guarantee of reliability. The greater the concerns raised by the circumstances in which the confession was made, the more important it will be to find markers of reliability in the confession itself or the surrounding evidence."

³⁴ At [106]–[107].

³⁵ At [86]. At [89] in her dissenting judgment, Karakatsanis J agreed with the majority on this point. The majority at [65], however, recognised that the "parties could find no case in which a Mr. Big confession had to date been excluded as an abuse of process". This is likely to change with the broader approach to that concept in *R v Hart*, above n 15.

³⁶ At [112].

³⁷ At [115].

³⁸ At [116]. This may mark a change from the previous position illustrated by *Bonisteel*, discussed above at n 26. However, note the discussion below at n 43.

³⁹ *R v Hart*, above n 15, at [115]–[117]. The majority in *Hart* gave the examples of "mental health problems, substance addictions, or youthfulness" as unacceptable vulnerabilities to prey on.

⁴⁰ At [145]–[146].

⁴¹ At the time the operation began Mr Hart was unemployed and socially isolated.

⁴² *R v Hart*, above n 15, at [143]–[144].

⁴³ At [148]. Two months after delivering its decision in *R v Hart*, a different result was reached in *R v Mack* 2014 SCC 58, [2014] 3 SCR 3. This was largely because the confession had led to the finding of remains,

As a result of *Hart*, the Canadian police have indicated that the age, educational level and economic condition of suspects will be considered before deciding whether to employ the Mr Big technique. Further, investigators will strive to obtain confirmatory evidence of any confession. Operations will also be shortened and better recorded.⁴⁴

Australia

The admission of confessions arising out of the Mr Big technique has been upheld in *Tofilau v The Queen*.⁴⁵ The appeal to the High Court from the State of Victoria, involved four separate appellants. The Court considered the admission of the statements in three parts: whether the confessions: (a) were obtained in breach of the voluntariness rule; (b) were involuntary in a more general or “basal” sense; or (c) should be excluded under the residual discretion to exclude evidence.⁴⁶

As to the voluntariness rule, the Court refused to extend the person in authority doctrine to undercover police officers purporting to be able to influence the course of a prosecution through corruption. This is because the test for voluntariness is largely subjective and the suspects clearly believed they were dealing with members of a criminal organisation, not with the police.⁴⁷ The Court also rejected arguments that the confessions were involuntary in a

this showing its reliability. Bullet casings at the site of the remains also matched those found in the accused’s apartment: at [34]. On the other hand, the criminal activity Mr Mack had been involved in was modest (lowering the prejudicial effect): at [35]. Further, there was no abuse of process. The Court said at [36], “[t]he appellant was not presented with overwhelming inducements. He had prospects for legitimate work that would have paid even more than the undercover officers were offering. Nor did the officers threaten the appellant with violence if he would not confess. The most that can be said is that the officers created an air of intimidation by referring to violent acts committed by members of the organization. But the appellant was not coerced into confessing.”

⁴⁴ See Daniel LeBlanc “RCMP to keep ‘Mr Big’ sting tactic” *The Globe and Mail* (online ed, 1 August 2014) <www.theglobeandmail.com>; and Mike Cabana “RCMP Statement Following the Supreme Court of Canada Decision in the Nelson Hart Case” (31 July 2014) Royal Canadian Mounted Police <rcmp-grc.gc.ca>.

⁴⁵ *Tofilau v The Queen*, above n 7. This case was decided in accordance with the law as it was before Victoria introduced, in accordance with Australia’s uniform evidence laws, the Evidence Act 2008 (Vict).

⁴⁶ The High Court (per Toohey, Gaudron and Gummow JJ), in an earlier case, *R v Swaffield* [1998] HCA 1, (1998) 192 CLR at [51]–[52] had set out the three classes of cases in which the discretionary principles of exclusion of evidence would be engaged. First, those cases where it would be unfair to the accused to admit the statement – unfairness in this sense is related to the law’s protection of the rights and privileges of the accused persons. The second is where considerations of public policy, such as improper police conduct, make it unacceptable to admit the evidence. The third concerns the general power to reject evidence on the ground that its prejudicial effect outweighs its probative value.

⁴⁷ *Tofilau v The Queen*, above n 7, at [13] per Gleeson CJ; at [29] per Gummow and Hayne JJ; and at [323] per Callinan, Heydon and Crennan JJ. Kirby J (dissenting) said at [176], “[t]o limit the class of ‘person in authority’ to those whom an accused *knows* or *believes* to have lawful authority makes no sense if the reason for the rule is to discourage officials from exploiting hope or fear to procure confessions statements from suspects against their own interest.”

more general or “basal” sense.⁴⁸ Neither a desire to obtain an advantage, such as acceptance into the criminal group, nor the mere fact of trickery on the part of the police would suffice.⁴⁹ The Court also held that the confession should not be excluded under the residual discretion for reasons of unfairness, probative value or public policy.⁵⁰

New Zealand

In New Zealand the admissibility of confessions is governed by the Evidence Act 2006. Statements made by a defendant that are proffered by the prosecution are admissible against that defendant⁵¹ unless excluded on reliability⁵² or oppression⁵³ grounds. Statements may also be excluded⁵⁴ because of a breach of the New Zealand Bill of Rights Act 1990⁵⁵ or other enactment or rule of law, or because they are unfairly obtained.⁵⁶ There is also a general requirement to exclude evidence where the prejudicial effect of the evidence exceeds its probative value.⁵⁷ As to whether evidence is unfairly obtained, one of the grounds is a breach of the Chief Justice’s Practice Note on Police Questioning.⁵⁸ Among other things, the Practice Note requires a person to be cautioned if there is sufficient evidence to charge the

⁴⁸ See the comments of Gummow and Hayne JJ at [60] where they say that “basal voluntariness” is concerned “with confessions made under compulsion”: “[t]he key inquiry is about the quality of the compulsion that is said to have overborne the free choice of whether to speak or to remain silent. In this context, ‘overborne’ should be understood in the sense ... as ‘the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure’.”

⁴⁹ At [22] per Gleeson CJ; at [81] per Gummow and Hayne JJ; at [347] per Callinan, Heydon and Crennan JJ. Kirby J dissented (see [204]).

⁵⁰ At [24] per Gleeson CJ; at [115] per Gummow and Hayne JJ; at [413]–[414] per Callinan, Heydon and Crennan JJ. Only one of the appellants had argued unfairness and, unlike in *Swaffield*, none had argued breaches of the Australian equivalent of the Judges’ Rules. However, some Australian States have legislative provisions stating that police responsibilities, such as cautions to persons arrested or in lawful custody, do not apply to undercover officers engaged in covert operations: see for example s 396 of Police Powers and Responsibilities Act 2000 (Qld).

⁵¹ Section 27. But not against a co-defendant.

⁵² Section 28. In cases where there is an evidential foundation for doubting a statement’s reliability, judges must exclude the statement unless satisfied on the balance of probabilities that the circumstances in which it was made were not likely to have adversely affected its reliability.

⁵³ Section 29. Where there is an evidential foundation suggesting that a statement was influenced by oppression, it must be excluded unless proved beyond reasonable doubt not to have been so influenced. Oppression is defined as oppressive, violent, inhuman or degrading conduct towards the defendant or any other person or the threat of such.

⁵⁴ I say “may” because evidence in these categories is excluded only after determining whether its exclusion is “proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety but also takes account of the need for an effective and credible system of justice.”

⁵⁵ Section 30(5)(a). The Bill of Rights protections only arise if a person is in custody and so would not usually be at issue in a Mr Big scenario case.

⁵⁶ Section 30(5)(c).

⁵⁷ Section 8(1)(a).

⁵⁸ *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297. This is a modification of the old Judges’ Rules, which were initially promulgated by the Judges of the Queen’s Bench Division in 1912.

person. The Court of Appeal, in *R v Cameron*, upheld the decision to admit confessions arising from the Mr Big technique on the basis that the confessions passed the reliability threshold and were not unfairly obtained, although in that case the lawfulness of the technique had been conceded.⁵⁹

Hong Kong

The different legal framework in Hong Kong likely explains why the police in that jurisdiction have not utilised the Mr Big technique. The main difference between Canada and Hong Kong relates to the way the residual discretion to exclude voluntary confessions operates with regard to undercover operations. This was dealt with by the Court of Final Appeal in *Secretary for Justice v Lam*,⁶⁰ albeit not in the context of a Mr Big operation.⁶¹ Under the Secretary for Security's rules and directions,⁶² as soon as a law enforcement officer has evidence that would afford reasonable grounds for suspecting that a person has committed an offence, the suspect must be cautioned before questions are put to him or her.

The Court in *Lam* differentiated those cases where an undercover officer plays a passive role and hears or overhears a confession⁶³ from those cases where an officer plays an active role in procuring the confession. This was on the basis that, if the operation were not undercover, "the suspect would have to be cautioned reminding him of his right of silence and enabling him to make a choice whether or not to speak".⁶⁴ The Court went on to say that the discretion to exclude the evidence will likely be exercised where there has been a functional equivalent

⁵⁹ See *R v Cameron* (pre-trial), above n 18, dealing with the issue before trial; and *R v Cameron* (post-trial), above n 18, dealing with the issue after trial. Since this paper was written the Supreme Court has examined the admissibility of evidence obtained in the course of a Mr Big operation. That judgment is subject to suppression orders until the defendant's trial. The judgment must not be published on the internet or on any publicly available database but may be published in law reports or law digests.

⁶⁰ *Secretary for Justice v Lam* (2000) 3 HKCFAR 168 (HKCFA).

⁶¹ The case involved police officers suspected of corruption. Another suspect, Mr Wing, was arrested and was granted immunity in exchange for helping the police gather evidence against other suspects. In a six month period Mr Wing adopted the role of a senior gang member and had recorded telephone conversations and interviews with the respondents in which they made numerous incriminating statements.

⁶² The Hong Kong equivalent of the Judges' Rules, promulgated in 1992. These rules are relevant to the exercise of the discretion.

⁶³ At 181, citing the cases of *R v Keeton* (1970) 54 CrAppR 267; and *HKSAR v Ng Wai Man* [1998] 3 HKC 103.

⁶⁴ *Secretary for Justice v Lam*, above n 60, at 181.

of an interrogation by an undercover officer as it “would constitute a derogation of the accused’s right of silence and thus prejudice his fair trial”.⁶⁵

In addition, although Hong Kong has adopted the voluntariness rule,⁶⁶ it may be that the definition of person in authority is wider than in Australia and Canada. It may include a person “such as a parent, teacher or priest, who has influence on the defendant”.⁶⁷ In a Mr Big operation the boss is set up to be in a position of influence and authority over the suspect.

England and Wales

In England and Wales, the admissibility of Mr Big confessions evidence has arisen in an extradition context. *R v Bow Street Magistrates’ Court, ex parte Proulx* involved a Canadian national based in England who had been the subject of a Mr Big-type operation to extract a confession. While the majority of the case was concerned about the use of the evidence in the extradition context, it was noted that, if the case had arisen in a domestic context, the evidence would likely be excluded.⁶⁸

In England and Wales, pursuant to the Police and Criminal Evidence Act 1984, codes of practice have been issued. Code of Practice C, which deals with the detention, treatment and questioning of persons by police officers, replaced the old Judges’ Rules. Cases have made it clear that undercover operations must not circumvent the PACE codes of practice.⁶⁹ As the Court said in *Regina v Christou*, “[i]t would be wrong for police officers to adopt or use an undercover pose or disguise to enable themselves to ask questions about an offence uninhibited by the requirements of the code and with the effect of circumventing it”.⁷⁰

Concerns about Mr Big confessions

Both in the caselaw and the literature on Mr Big operations, a number of concerns have been raised with the technique. The main concern is with reliability and the spectre of false

⁶⁵ At 181. However, given all the requisite evidence was not before the Court, the issue was sent back to the trial Court to determine. The trial judge subsequently exercised his discretion to exclude the evidence: *HKSAR v Lam* DCCC 529/1997 (7 February 2001), [2001] 2 HKLRD 557 at [65].

⁶⁶ See *Secretary for Justice v Lam*, above n 60, at 177.

⁶⁷ *HKSAR v Lam Hon Kwok* CACC 528/2004 (CA) at [34]. There has not, however, been a case where the issue of who is a person in authority has been definitively decided.

⁶⁸ *R v Bow Street Magistrates’ Court, ex parte Proulx* [2001] 1 All ER 57 (QB) at [75] per Mance LJ.

⁶⁹ See *Regina v Christou* [1992] 1 QB 979 (CA); and *R v Bryce* [1992] 95 Cr App R 320 (CA).

⁷⁰ *Regina v Christou*, above n 69, at 991.

confessions.⁷¹ But there have also been issues raised about the legitimacy of state action that effectively coerces a suspect into confessing, particularly if that involves oppressive conduct or the subversion of rights accorded to suspects. There have been more general concerns expressed as to the technique, involving as it does fake criminal activity. The prejudicial effect at trial of evidence showing often enthusiastic involvement in criminal activity has also been pointed to as of concern.

I propose to examine each of these concerns in turn, although recognising that many may overlap. I will do this from first principles, as against being tied to the legal rules of any particular jurisdiction. My aim is to raise the arguments both for and against Mr Big operations for consideration, rather than coming to any definitive conclusions.

Reliability

Concern about false confessions

Mr Big operations offer substantial inducements to confess, including full membership of the organisation and assistance with any police investigation. These are, however, offered in an atmosphere where it is made clear that anything short of a full confession will not be believed and therefore will not lead to the advantages promised. This provides suspects with an incentive to confess, even if they are innocent. Further, the operation design ensures that a confession is seen by the suspect as without risk of adverse consequences, made as it is to the head of a criminal organisation with the values of trust and loyalty that have been stressed throughout the operation.⁷² Concerns about false confessions are exacerbated in cases where it is suggested, in the course of the Mr Big operation, that violence may greet any failure to confess or where suspects are encouraged to boast about their crimes.

⁷¹ The issue of reliability was central to the Supreme Court of Canada's decision in *R v Hart*, above n 15. See also Moore, Copeland and Schuller, above n 4, at 378–393; and S Smith, V Stinson and M Patry “Using the ‘Mr. Big’ Technique to Elicit Confessions: Successful Innovation or Dangerous Development in the Canadian Legal System” (2009) 15 *Psychology, Public Policy and Law* 168 at 180–183.

⁷² In some cases it may even be seen as beneficial to boast of crimes committed, a further incentive for a false confession: see the majority's comment in *R v Hart*, above n 15, at [68] where the majority summarised the issue as follows: “[o]ver a period of weeks or months, suspects are made to believe that the fictitious criminal organization for which they work can provide them with financial security, social acceptance, and friendship. Suspects also come to learn that violence is a necessary part of the organization's business model, and that a past history of violence is a boast-worthy accomplishment. And during the final meeting with Mr. Big – which involves a skillful interrogation conducted by an experienced police officer – suspects learn that confessing to the crime under investigation provides a consequence-free ticket into the organization and all of the rewards it provides.”

The problem of false confessions is not just theoretical. Of the first 250 DNA exonerations in the United States, 40 (16 per cent) involved false confessions.⁷³ Indeed, it was the emergence of proved false confessions that caused criminal justice professionals to acknowledge that this was a real issue.⁷⁴ In recent years, various experiments have been conducted in an attempt to isolate the factors that may induce people to confess to crimes they have not committed.⁷⁵ Experiments have shown that promises of leniency can induce false confessions. Minimisation (for example suggesting that actions were justifiable by external factors) can be subtler but nevertheless can produce the same effect.⁷⁶ Both of these factors are usually present in Mr Big operations. Other experiments have shown that isolation, youth, other vulnerabilities of persons and particular interrogation techniques can also induce false confessions.⁷⁷ Many of these factors are present in Mr Big operations.

It does appear that there have been some occasions in Canada where the risk of the Mr Big technique causing a false confession may have crystallised: the cases involving Kyle Unger,⁷⁸ Andrew Rose and Cody Bates. As to Kyle Unger, he was convicted of murder in 1993 and this was partly on the basis of a confession obtained through a Mr Big operation. Subsequent DNA testing ruled out physical evidence that had initially been relied upon to link Mr Unger

⁷³ Brandon Garrett *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Harvard University Press, Cambridge (MA), 2012) at 181 and 295. Professor Gudjonsson has called these cases just the “tip of the iceberg”: Gisli Gudjonsson “False Confessions and Correcting Injustices” (2012) 46 *New Eng L Rev* 689 at 690.

⁷⁴ It used to be thought that false confessions were not an issue. Rather the difficulty with confessions was in assessing whether they had actually been made because witnesses (such as “paid informers, angry victims or over-zealous police officers”) often had a motive to lie: see John Henry Wigmore *Wigmore on Evidence* (Chadbourn revision, Aspen Law & Business, United States of America, 1970) [Wigmore] vol 3 at §820b. Wigmore considered a confession (if proved to have been made), however, to be evidence of the highest quality: “[t]he confession of a crime is usually as much against a man’s permanent interests as anything well can be; and ... no innocent man can be supposed ordinarily to risk life, liberty or property by a false confession. Assuming the confession as an undoubted fact, it carries a persuasion which nothing else does, because a fundamental instinct of human nature teaches each one of us its significance.”

⁷⁵ The experiments conducted often, due to the requirement for ethics board approval, involve relatively trivial matters. Because of this, the circumstances replicating the Mr Big technique have not been able to be created in the laboratory.

⁷⁶ S Kassin “The Social Psychology of False Confessions” (2015) 9 *Social Issues and Policy Review* 25 at 35.

⁷⁷ See for example Gisli Gudjonsson “False Confessions and Correcting Injustices” (2012) 46 *New Eng L Rev* 689 at 700; and I Candel and others ““I hit the Shift-key and then the computer crashed””: Children and false admissions” (2005) 38 *Personality and Individual Differences* 138.

⁷⁸ Referred to by the Supreme Court of Canada in *R v Hart*, above n 15, at [62].

to the murder scene. While a new trial was ordered, it was eventually abandoned as the Crown thought it was be too unsafe to try him on the available evidence.⁷⁹

Andrew Rose was suspected of committing the unsolved murder of two German hitchhikers in British Columbia. He was convicted in two trials, with both convictions being set aside. Before the third trial, the police decided to commence a Mr Big operation. Mr Rose was subjected to “relentless pressure, abusive language, threats, inducements, robust challenges and psychological manipulation” in his final interview with Mr Big.⁸⁰ After many emphatic denials, his confession to Mr Big included the statement “Well, we’ll go with I did it, ok?”⁸¹ During the third trial, the Crown dropped the case against him as DNA testing could not link him to the crime.⁸²

As the third example, Cody Bates was involved in the attempted robbery and homicide of a drug dealer. As a result of a Mr Big operation, he confessed to shooting the victim and said that he was “just eliminating the competition” and he “didn’t feel bad in the least”. However, the agreed statement of facts at the trial stated that it was not in fact Bates who had shot the victim, but rather Bates’ co-defendant who had shot the victim by accident.⁸³

In light of the above, the issue is whether (and the extent to which) confessions resulting from Mr Big operation should be admitted in evidence. A false confession has no probative value and therefore no relevance to the trial. So a confession that is obviously false⁸⁴ should not go before a jury. But, in the case of Mr Big scenario confessions, there will usually only be a risk that a confession may be false. The risk may be significant but, in the absence of incontrovertible proof of falsehood, there remains a possibility that the confession is true.

⁷⁹ See *R v Unger* (1993) 85 Man R (2d) 284 (MBCA); *R v Unger* (2005) 196 Man R (2d) 280 (MBCA); and BA Macfarlane “Wrongful Convictions: Determining Culpability when the Sand Keeps Shifting” (2014) 47 UBC L Rev 597 at 615–616.

⁸⁰ Gisli H Gudjonsson *The Psychology of Interrogations and Confessions: A Handbook* (Wiley, Chichester (UK), 2003) at 578. As some further background, a United States man had apparently confessed on numerous occasions to the murders prior to committing suicide and, subsequent to the second trial, DNA testing on two exhibits excluded Mr Rose as the source of the DNA. In addition, the man who committed suicide could not be eliminated as a contributor to some of the DNA which was found on the exhibits.

⁸¹ At 574–575. Professor Gudjonsson testified at the voir dire prior to the trial and it was his view that the confessions to the undercover officers were unreliable for a number of reasons set out in his book: see Gudjonsson, above n 80, at 576–578.

⁸² At 581.

⁸³ See *R v Bates* 2009 AQBD 379, 368 AR 158.

⁸⁴ For example as may be the case in situations where the key motivation is to seek notoriety: Gudjonsson, above n 73, at 693–694.

The arguments for no reliability filter

One could argue that, as long as there is a possibility of a true confession, the evidence should go before the jury as it is the role of the jury in a jury trial to decide on the facts.⁸⁵ Indeed, there are many instances of potentially unreliable evidence that go before juries. The best example may be jailhouse confessions,⁸⁶ where there are not only the reliability issues with content but issues as to whether the confessions were made at all, given the incentives for inmates to lie.⁸⁷ Jailhouse confessions are usually held to be admissible and the risk of unreliability is dealt with by strong directions to the jury.⁸⁸

Another example of potentially unreliable evidence that goes before juries is identification evidence. Approximately three-quarters of the convictions that have been exonerated by DNA evidence in the United States were based on faulty eye-witness testimony.⁸⁹ As with confessions, juries have difficulty assessing the reliability of identification evidence and have a tendency to put inordinate weight on it. More importantly, the factors they use to assess

⁸⁵ See for example the US Supreme Court's comments in *Shannon v United States* 512 US 573 (1994) at 579 where it said "[t]he jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged".

⁸⁶ Also called "cell confessions" and "prison confessions".

⁸⁷ See the comments of the Judicial Committee of the Privy Council in *Benedetto v The Queen* [2003] 1 WLR 1545 at [31] and [32]. Even if no explicit concessions are offered to the informant, there remains the hope of more favourable treatment. In some instances, incentives to lie may include protecting the actual culprit which would be particularly dangerous as the false confession could in those cases include details known only to the perpetrator, markedly increasing the apparent reliability of the confession.

⁸⁸ In Canada, see *Vetrovec v The Queen* [1982] 1 SCR 811, applied in *R v Brooks* 2000 SCC 11, [2000] 1 SCR 237 in the context of jailhouse confessions. In the Canadian context, see also the miscarriage of justice inquiry into the Thomas Sophonow case where Commissioner Cory vividly stated "[j]ailhouse informants ... rush to testify like vultures to rotting flesh or sharks to blood. They are smooth and convincing liars. Whether they will seek favours from the authorities, attention or notoriety they are in every instance completely unreliable. It will be seen how frequently they have been a major factor in the conviction of innocent people and how much they tend to corrupt the administration of justice. Usually their presence as witnesses signals the end of any hope of providing a fair trial": Hon Peter Cory "The Inquiry Regarding Thomas Sophonow" (2001) at 63. As to the position in Australia, see *Pollitt v The Queen* (1992) 174 CLR 558; and *Rozenes v Beljajev* [1995] 1 VR 533 (VSCA). For New Zealand, see s 122(2)(c) and (d) of the Evidence Act 2006 and the recent Supreme Court case of *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 dealing with the issue. The Supreme Court held at [36] that, while there may be some scope to exclude prison admission evidence under the Evidence Act (pursuant to ss 7 and 8), "[t]he legislative scheme as a whole is indicative of a legislative intention that reliability decisions ought to be made by a properly cautioned jury".

⁸⁹ See Ian Fraser and others "The Police Line-up and Its Impact on the Justice System" (2009) 54 Crim L Q 332 at 333; and Margery Koosed "Reforming Eyewitness Identification Law and Practices to Protect the Innocent" (2009) 24 Creighton L Rev 595 at 597.

reliability, such as witness confidence, memory for peripheral details and consistency of description, are not necessarily indicative of the reliability of the evidence.⁹⁰

There has been a great improvement in recent years in the gathering of identification evidence and limits on the admissibility of evidence where proper standards are not met.⁹¹ But, because of the inherent difficulties with identification, such improvements do not necessarily lead to accurate identifications. As noted by the British Psychological Society, several surveys have established that, even with the use of properly constituted identification parades, there is an approximate error rate of 20 per cent.⁹²

Even aside from those examples, human memory is fallible at all three stages: acquisition, retention and retrieval. There are also issues with the techniques used to acquire witness accounts and with the inability of people to detect falsehood.⁹³ This means that the cornerstone of evidence proffered in criminal trials, oral evidence from participants or bystanders, is potentially unreliable and difficult for juries to assess properly.

In summary, the argument against a reliability filter for Mr Big confessions rests heavily on the proposition that it should be up to the jury, as the central fact finder in the criminal justice system, to assess the reliability of confession evidence. It is on the totality of evidence that decisions must be made. What may appear unreliable considered in isolation may, in the context of the whole case, in fact be reliable and vice versa. Juries or judge alone fact finders should therefore have access to all available evidence.

⁹⁰ As noted by the New Zealand Law Commission in *Evidence: Reform of the Law* (NZLC R55 – Vol 1, 1999) at [199] [“Reform of the Law”].

⁹¹ In New Zealand, see for example ss 45–46A and 126 dealing with identification evidence and Law Commission *Evidence: Total Recall? The Reliability of Witness Testimony* (NZLC MP 13, 1999) 11–36. As to Australia, see Australian Law Reform Commission *Uniform Evidence Law* (ALRC 102, 2006), Chapter 13 on “Identification Evidence”; see s 113–116 of the Uniform Evidence Acts, ss 3ZM–3ZQ of the Australian Commonwealth Crimes Act 1914 (the Commonwealth Crimes Act), and ss 233–237 of the Crimes Act 1900 (ACT). As to England and Wales, see Police and Criminal Evidence Act 1984, ss 66 and 78; Code D: Code of Practice for the Identification of Persons by Police Officers (effective from 7 March 2011); and Narissa Somji “When Will the Law Catch up to Science? A Call for Legislating Identification Procedures” (2009) 54 Crim L Q 299 at 317–318. For a summary of the position in Canada, see Angela Baxter “Identification Evidence in Canada: Problems and a Potential Solution” (2007) 52 Crim L Q 175.

⁹² British Psychological Society *Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory* (Revised April 2010) at 33.

⁹³ See L Smith and S Glazebrook “Assessing Witnesses: Can the Skills be Taught” (2013) 1 Judicial Education and Training 83 at 99. For more on the fallibilities of memory, see Matthew Gerrie, Maryanne Garry and Elizabeth Loftus “False Memories” in N Brewer and K Williams (eds) *Psychology and Law: An Empirical Perspective* (Guilford, New York, 2005) at 222–253. On detecting lies and deceit generally, see Aldert Vrij *Detecting Lies and Deceit: Pitfalls and Opportunities* (2nd ed, John Wiley and Sons Ltd, England, 2008).

The law, as it stands, already puts before juries types of evidence that are known to be fallible. Confessions elicited from Mr Big scenarios should not be treated differently. On this line of reasoning, strong judicial directions giving proper assistance on how to assess the evidence, not a reliability filter or threshold, should be the mechanism by which the risks are mitigated.

Arguments for a reliability filter

Those arguing in favour of a reliability filter point out that confession evidence is very powerful evidence, raising the real risk of wrongful convictions.⁹⁴ Most people believe that they would never confess to a crime they did not commit and are thus very sceptical about claims of false confessions.⁹⁵ In addition, studies have shown that people (including law enforcement agents) are unable to distinguish between true and false confessions.⁹⁶

Even more concerning, studies have shown that people do not adequately discount confessions, even if they are perceived to have been coerced. For example in one experiment mock jurors were told that a confession had been induced by violence and that they should disregard it.⁹⁷ The conviction rate was 44 per cent. This compared to a conviction rate of 19 per cent in a control group where the evidence did not include a confession.⁹⁸ This experiment raises real issues, not just about the ability of juries to assess the weight to be attached to a coerced confession, but also as to the value and effect of jury directions. Just as concerning is that similar results occurred when the participants were experienced judges.⁹⁹

Confessions may also influence the way in which other evidence is interpreted. For example, in one experiment, identification of innocent suspects in line-ups increased markedly if

⁹⁴ Kassin, above n 76, at 37.

⁹⁵ At 38.

⁹⁶ In one study, despite being less able to distinguish a false confession from a true one than the student participants, the confidence of law enforcement agents in their ability to do so was higher than that of the students: S Kassin, C Meissner and R 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 at 222.

⁹⁷ The vast majority of participants remembered these instructions.

⁹⁸ S Kassin and H Sukel “Coerced Confessions and the Jury: An Experimental Test of the ‘Harmless Error’ Rule” (1997) 21 *Law & Hum Behav* 27 at 42.

⁹⁹ See D Wallace and S Kassin “Harmless error analysis: How do judges respond to confession errors?” (2012) 36 *Law & Hum Behav* 151. This raises a real issue for judge alone trials where the same judge decides on the issue of admissibility and the ultimate verdict. This is because, even if judges hold the confession inadmissible, it may nevertheless affect their verdict.

witnesses were told there had been a confession in the case.¹⁰⁰ In another experiment, eyewitnesses to a mock crime were told that a different line-up member than the one they had selected had confessed. A majority changed their identifications. Of those who had not made an initial identification, half subsequently selected the confessor once his identity was revealed.¹⁰¹ The risk of a confession tainting the perception of other evidence is obviously a real issue if a confession is false.

How should any filter operate?

If there should, because of the risk of false confessions, be some filter before Mr Big confessions are placed before a jury, the next issue is when and how that filter should operate. This would presumably depend on the extent of the apparent reliability of the confession. The difficulty remains that judges are human too and so, in assessing threshold reliability questions, may be just as unable as jurors to assess whether a confession is reliable. They may rely too heavily or misinterpret the significance of other evidence in making their assessment.

Obviously, those confessions that lead to the discovery of evidence not known about by the police (including the discovery of remains) at first blush must be seen as being the most reliable. The next most reliable confessions may be thought to be those which refer to evidence known to the police but not publicly available. The difficulty with that view is that, of the first 40 DNA exoneration cases mentioned above, 38 “contained detailed and persuasive incriminating facts that must have either wittingly or unwittingly originated from the police”.¹⁰² As it is not usual to tape all stages of the Mr Big operations, there will be no way for a judge to know if this has occurred, unless there was a policy of not briefing police participants on the crime the suspect is alleged to have committed. If possible police contamination is eliminated, the only real risk remaining is that the suspect got the details from the true perpetrator but whether that is the case or not seems a quintessentially jury question.¹⁰³

¹⁰⁰ See Kassin, above n 76, at 39.

¹⁰¹ See L Hasel and S Kassin “On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identifications?” (2009) 20 Psychological Science 122.

¹⁰² See Gudjonsson, above n 73, at 691. See also Garrett, above n 73, at 19–21.

¹⁰³ This was the defence argued, and rejected by the jury, in the Australian case involving Mr Brett Cowan: see *R v Cowan*, above n 17, at [12].

Other indicia of reliability include consistency with other evidence in the case (but known to the public and the suspect) and the general plausibility of the confession, including any apparently genuine emotional reaction when confessing. Relying on the general plausibility of a statement and internal clues pointing to reliability may be dangerous. In a study of 20 proved false confessions,¹⁰⁴ it was found that they contained not only vivid sensory details about the crime but “statements about the confession’s motivation, assertions that the confession is voluntary, apologies and expressions of remorse”.¹⁰⁵

All this suggests that, if there is to be a filter, the more likely the circumstances in which the confession is obtained point to the risk of unreliability, the stronger the indications of actual reliability should be and preferably those indications of reliability should be found outside of the confession itself.¹⁰⁶

Conclusion

Whether there is a reliability filter or not, there will still remain the risk of false confessions. It may be necessary to admit that our trial processes can never be perfect and all that can be done is to try our best to avoid miscarriages of justice. In this endeavour, jury directions will be important.¹⁰⁷ Expert evidence, particularly in what may be counter-intuitive areas (for example where jurors think they would not falsely confess and evaluate others accordingly) may also assist.¹⁰⁸ Robust post-trial procedures for assessing criminal miscarriages would also be important.¹⁰⁹

¹⁰⁴ Proved on the basis that 14 of the defendants were exonerated by DNA evidence and the other six were exonerated by other means (eg acquittal at trial, the real perpetrator was found or the conviction was overturned on appeal and the defendant was not re-tried): S Appelby, Lisa Hasel and S Kassir “Police-induced confessions: an empirical analysis of their content and impact” (2011) *Psychology, Crime & Law* 1 at 4. Of these 20 confessions, only nine were audiotaped or videotaped.

¹⁰⁵ See Kassir, above n 76, at 39 and Appelby, Hasel and Kassir, above n 104, at 5–7.

¹⁰⁶ See the comments of the majority in *R v Hart* in set out at n 33 above.

¹⁰⁷ As noted above, there may be concerns about their efficacy. However, to increase the chances of directions having an effect, at the least they should be in plain English and focused on the actual issues at hand. In the Mr Big context, some academics have suggested extensive and robust jury directions: see for example, H A Kaiser “*Mack: Mr Big Receives an Undeserved Reprieve, Recommended Jury Instructions Are Too Weak*” (2014) 13 CR (7th) 251. I am not to be seen as necessarily endorsing those suggested directions.

¹⁰⁸ For some recent New Zealand cases on the issue of counter-intuitive evidence, see the Supreme Court cases of *DH (SC 9/2014) v R* [2015] NZSC 35, [2015] 1 NZLR 625 and *Kohai v R* [2015] NZSC 36, [2015] 1 NZLR 833.

¹⁰⁹ For a discussion on the issue of miscarriages of justice, see for example G Hammond “The New Miscarriages of Justice” (Harkness Henry Lecture, University of Waikato, Hamilton, 2006) available at <www.courts.govt.nz>; and M D Birdling “Correction of Miscarriages of Justice in New Zealand and England” (Doctor of Philosophy thesis, University of Oxford, 2012). In this context it is also important to

Oppression

Some of the Mr Big operations have involved violent scenarios designed to instil in the suspect a fear that violence could greet a person who was not honest with or who betrayed the organisation.¹¹⁰ Of course, in the case of Mr Big operations, this is only simulated violence to others but the suspect is encouraged to think it is real. Under the new approach in *Hart*, violence or the threat of violence are less likely to be acceptable. Such tactics would also likely fall foul of the oppression rule in New Zealand and the basal voluntariness rule in Australia.¹¹¹

Fear of violence can lead to false confessions and so would be relevant to the issue of reliability discussed above. Excluding evidence obtained through violence or the threat of violence does not merely meet reliability concerns, however. It also makes it clear that violence is unacceptable in a civilised society and in particular that it is unacceptable behaviour for those who should be enforcing the law to pretend to perpetrate or endorse violence.¹¹²

Coerced self-incrimination

A confession obtained through the Mr Big technique is very far from a confession where the suspect chooses voluntarily to speak, with no pressure to do so. The whole design of the operation is carefully calibrated to force a confession:¹¹³ the creation of the false world,

recognise the work of many not-for-profit organisations worldwide, such as the Innocence Project, that attempt to correct miscarriages of justice. In Canada, Royal Commissions of Inquiry have been used to investigate alleged miscarriages of justice. In the Canadian context, see also K Roach “Wrongful Convictions in Canada” (2012) 80 U Cin L Rev 1465. As to the position in Australia, see Lynne Weathered “Wrongful Conviction in Australia” (2012) 80 U Cin L Rev 1391.

¹¹⁰ See for example *R v Terrico*, above n 10. In this Canadian case, one of the scenarios involved a “mock beating” in a hotel room. The accused waited outside the hotel room while this occurred. The hotel room was arranged to look as if a fight had taken place and “blood” was smeared on the “beaten up” undercover officer’s face. The officers acknowledged that their objective was to convey the impression that the gang was “violent and ruthless and that one can get beaten up, if not worse, when one lies to them”.

¹¹¹ See also art 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987). Australia became a signatory to the Convention against Torture on 10 December 1985. Canada became a signatory to the Convention against Torture on 23 August 1985. As to Hong Kong, the Convention against Torture has applied to Hong Kong since 1992. On 10 June 1997, China notified the Secretary-General that the Convention against Torture, with the reservations made by China, will also apply to the Hong Kong Special Administrative Region. New Zealand became a signatory to the Convention on 14 January 1986.

¹¹² See, for example, the majority’s comment in *R v Hart*, above n 15, at [116], where they said “[a] confession derived from physical violence or threats of violence against an accused will not be admissible – no matter how reliable – because this, quite simply, is something the community will not tolerate”.

¹¹³ As the majority in *R v Hart*, above n 15, at [68] said, “[t]he purpose of these operations is to induce confessions, and they are carefully calibrated to achieve that end.”

gradually drawing the suspect into that false world at great expense,¹¹⁴ the setting up of Mr Big as an authority figure to be respected (and in some cases feared), the build up to the interview with Mr Big as the final barrier to be passed before the promised rewards (financial, social and above all the assistance with the criminal charges), and the interview itself, often characterised by interrogative techniques (aside from the inducements already mentioned) that would not be acceptable in a formal police interview.¹¹⁵ It has been argued that all this means that, in practical terms, Mr Big operations leave the normal run of suspects with no choice but to confess.¹¹⁶

In most jurisdictions it would be thought inappropriate for the police in their official capacity to offer inducements and threats to force a suspect to confess. This would particularly be the case after the suspect has been charged and especially if they are in detention. However, the voluntariness rule, which is still applied in a number of jurisdictions, also applies pre-detention. The original reason for the voluntariness rule was a concern about the reliability of confessions extracted by means of threats or promises.¹¹⁷

The rationale are now wider. The rule has become in recent years also a means of ensuring the self-determination of the suspect (embodying the principle that the person should have a choice whether or not to confess) and also as dealing with issues of police conduct in extracting confessions.¹¹⁸ It could be argued that Mr Big operations, in effectively forcing suspects to confess, fall foul of these other rationale for the voluntariness rule and do so by using the coercive power of the state, albeit not overtly.¹¹⁹ Indeed, some might say that the covert forcing of a confession by the state is even worse, given that it involves deception so

¹¹⁴ As explained above.

¹¹⁵ For example, see the comment in *Tofilau v The Queen*, above n 7.

¹¹⁶ See the comments in Moore, Copeland and Schuller, above n 4, at 388.

¹¹⁷ See A Godsey “Rethinking the Involuntary Confession Rule: Toward a Test for Identifying Compelled Self-Incrimination” (2005) 93 California L Rev 465 at 484; and Wigmore, above n 74, at §820b.

¹¹⁸ See the thorough discussion of the history and rationale changes underlying the voluntariness rule by Gummow and Hayne JJ in *Tofilau v The Queen*, above n 7, at [43].

¹¹⁹ See the remarks of Kirby J in dissent in *Tofilau v The Queen*, above n 7, at [204]: “the will of the suspect (in respect of the choice whether to speak or to withhold incriminating statements, in a context where police officers were present, and the statements were being recorded for future use in evidence) was overborne by the tactics used to extract the confessional statements. That will was overborne because tricks and deception were targeted directly at the suspect’s fundamental legal right under our criminal justice system, namely to remain silent in the presence of police investigators. As to the suggestion that the tricks used by the undercover police officers were tolerable because the officers did not threaten violence, engage in unlawful conduct or use intimidation or duress to obtain the confessions, it is necessary to remember that violence, intimidation and duress can be deployed in different manifestations. For frightened, vulnerable people of low intellect, a physical bashing may be much less effective than trickery and manipulation.”

that a suspect does not even know that he or she is dealing with the police. As a recent article says:¹²⁰

[t]he 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 other hand, others would argue that suspects still retain a choice whether or not to confess in the course of a Mr Big operation.¹²¹ Some subjects of Mr Big operations have indeed refused to confess, despite the inducements to do so.¹²² It could be argued that those who do confess do so for reasons of greed. While they might also confess for assistance with the criminal charges, they could have had no expectation that any assistance was lawful, given that it is provided by what is thought by the suspect to be a criminal organisation. Suspects in effect confess to avoid the consequences of their offending. This (assuming the confession is reliable) may even be seen as a strong argument in favour of admissibility.

Avoiding Rights and Protections

Another argument against Mr Big operations is that they involve the eliciting of confessions without administering a caution to remind the suspect of the right to remain silent and of the right to counsel. Whether this is seen as a concern may depend in part on the stage at which particular jurisdictions require cautions to be administered. As discussed above, some jurisdictions require a caution once there are reasonable grounds to suspect that a person has committed a criminal offence (for example, Hong Kong and England). Some require a caution only where there is sufficient to charge (New Zealand). Yet others only require a caution when a person is arrested or detained (Canada).¹²³ But there remains the issue of whether undercover officers should be required to caution suspects at all.

¹²⁰ Moore, Copeland and Schuller, above n 4, at 378.

¹²¹ This was the view of the majority of the Court in *Tofilau v The Queen*, above n 7, in which they held that, in terms of basal voluntariness, the Mr Big scenarios did not compel the appellants to speak: see at [22] per Gleeson CJ; at [80], [88], [98] and [108] per Gummow and Hayne JJ; and [349]–[389] per Callinan, Heydon and Crennan JJ.

¹²² See for example Jason Dix who, as a suspect in two execution-style killings, was the subject of a 13 month Mr Big operation in Canada. No incriminating statements were made and Mr Dix eventually sued the Crown on numerous grounds, including malicious prosecution and false imprisonment. He was awarded some \$750,000: see *Dix v Canada (Attorney-General)*, above n 9.

¹²³ A discussion of when the line should be drawn is beyond the scope of this paper. As to the Australian position, many States have enacted provisions regulating the conduct of police interrogation and when officers are required to administer a caution: see further J D Heydon Cross *on Evidence – Australian*

Undercover officers should not have to caution

Some would argue that the rules as to cautions should apply only when the suspect is speaking to the police in their official capacity. When the police are acting undercover, the suspect does not know they are speaking to a law enforcement officer and so will not have been influenced to confess by the official status of the questioner.

Further, to require cautions in the investigative stages will unduly limit undercover operations. Undercover police officers in the course of such operations would have to caution a suspect once an incriminatory statement about any offending is made, even if that means breaking cover and jeopardising the whole operation and perhaps even their own safety.

Mr Big operations in particular would be severely hampered.¹²⁴ These operations have achieved results in serious cases that would otherwise remain unprosecuted and have even in some cases led to the finding of previously undiscovered remains of victims, something of great significance for relatives.¹²⁵

Covert operations should respect rights

Others would argue that, if the police should have administered a caution had they been questioning the suspect officially, then they should be required do so if questioning covertly, at least where that questioning amounts to the functional equivalent of an interrogation.¹²⁶ If that were not the case, the rules as to cautions could be easily subverted.

Many suspects who are subjected to the Mr Big technique will have had dealings with the police during the official investigation into the offending and in many instances may have had the assistance of counsel. They may have given their version of events to the police or they may have refused to speak to the police, exercising their right not to answer questions. In either case their decision on how to react to the investigation has been overridden by the

Edition (loose leaf, LexisNexis) at [33775]. Many of the States appear to have adopted the Hong Kong and England level of “reasonable grounds to suspect”.

¹²⁴ See for example the comments of Garry Clement, a former Royal Canadian Mounted Police superintendent who said the Mr Big technique is a “must” and “[a] lot of when we use this type of operation ... it’s dealing in the case of murders. A lot of times it’s dealing in cold cases”: Sarah Trick “Despite ruling, Mr. Big tactic ‘a must’: expert” (31 July 2014) Global News <www.globalnews.ca>.

¹²⁵ See for example, the cases of *R v Copeland* 1999 BCCA, (1991) 131 BCAC 264; *R v Cowan*, above n 17; and *R v Mack*, above n 43.

¹²⁶ See the discussion of the England and Wales and Hong Kong cases above.

setting up of the false reality by the police who, in their official capacity, were likely to make no further progress. This is unfair and the unfairness is exacerbated if undercover police are allowed to interrogate a suspect without administering a caution.

Further, the fact an operation is undercover may even increase the need for a caution. The suspect does not know the questioner is a police officer and therefore has not made a conscious choice whether or not to speak to the police. When confessing to a private individual, such as a relative or friend, a suspect only takes the risk of that confession being passed onto the police.¹²⁷ In Mr Big operations, contrary to the suspect's reasonable expectations engendered by the police in the course of the operation, it is certain the confession will be used by the police.

Even if a caution has to be administered in undercover operations, this would not inhibit ordinary undercover operations. The purpose of most undercover operations is to gather evidence of crimes and not to elicit confessions.¹²⁸ Confessions made to, or in the hearing of undercover officers will still be admissible as long as they were not actively elicited.¹²⁹

Police Conduct

There are two other aspects of Mr Big operations that may engage concerns about the proper conduct of the police: whether the police should use a technique that risks false confessions and that creates a false criminal world. There is also the issue of whether it is appropriate to deal with police conduct issues by excluding evidence.

Risk of false confessions

The first (and probably the most concerning, given that it has the most potential to lead to substantive miscarriages of justice), is that the methods used by the police in these operations, including promises to make charges go away, have the potential to lead to false confessions. It is true that the Mr Big technique succeeds in persuading some offenders to confess to

¹²⁷ This comment was made by the majority in *R v Hebert*, above n 4, where they said, at 181, “[i]f the suspect speaks, it is by his or her own choice, and he or she must be taken to have accepted the risk that the recipient may inform the police.”

¹²⁸ As Karakatsanis J said in *R v Hart*: “[u]ndercover officers usually role-play within existing circumstances to observe suspects and *gather* evidence – not to *generate* confessions...”: *R v Hart*, above n 15, at [216].

¹²⁹ Further, most normal undercover officers will not be placed in a position of apparent authority over suspects or be in a position to offer incentives to confess. The issue of coerced confessions therefore will not arise.

crimes they have actually committed when they would not otherwise have done so (true confessions) but this is likely to be at a cost of at least some false confessions.¹³⁰

In addition, there is research to suggest that a confession may taint the gathering of other evidence,¹³¹ and limit the investigation of other legitimate avenues of inquiry.¹³² The risk therefore is that the investigation will cease or be distorted, even if a confession is in fact false, leaving the true perpetrator free. A confession may also serve to reduce the availability of potentially exculpatory evidence at trial and therefore the ability of a jury or judge to assess whether or not the confession is true.

The police in most jurisdictions have been working to ensure that their official questioning techniques and practices minimise, to the extent possible, the risk of false confessions. The issue is whether it is proper for undercover police in the course of Mr Big operations to be released from the constraints that would apply were they questioning in their official capacities. In other words, should the police be able to use techniques known to increase the risk of false confessions undercover when they could not, and would not, use these overtly?

It could be argued that, if confessions pass a threshold reliability test, then the risk that a confession may nevertheless be false is an acceptable risk, arising as it does from a technique that has been successful in extracting true confessions to serious crimes and in some cases to the discovery of further evidence.¹³³ In any event, the question of whether a confession is reliable should, assuming an appropriate threshold reliability standard is met, be for the jury or judge fact finder to assess in light of the totality of the evidence.

Others would argue that this analysis employs unacceptable “end justifies the means” reasoning, exacerbated by the fact that both judges and juries place great weight on confessions and have difficulty recognising false confessions. Such commentators would say that the police should maintain standards, whether operating in their official capacity or undercover, and that these standards should eschew methods of interrogation that carry an

¹³⁰ This is assuming that the research on false confessions can be applied to Mr Big operations.

¹³¹ See S Kassin “Why Confessions Trump Innocence” (2012) 67 *American Psychologist* 431 at 436.

¹³² See for example, S Kassin and others “Police-Induced Confessions: Risk Factors and Recommendations” (2010) 34 *Law & Hum Behav* 3 at 23 where the researchers stated that, once the police obtain a confession, they “often close their investigation, deem the case solved, and overlook exculpatory evidence or other possible leads” even if there is good reason to doubt the reliability of the confession.

¹³³ For a discussion of the consequentialist argument in favour of deceptive police practices, see the discussion in Andrew Ashworth “Should the Police be Allowed to Use Deceptive Practices?” (1998) 118 *LQR* 108 at 117–118.

unacceptable risk of false confession.¹³⁴ The courts should not be party to the breach of proper standards of police behaviour in this regard.

False criminal world

Another aspect of Mr Big operations that has attracted criticism is whether it is proper for the police to create a false criminal reality.¹³⁵ In many cases the subjects of Mr Big operations have had little or no meaningful prior criminal history. They have also often been socially isolated and financially vulnerable (possibly due to having been charged with a serious offence).¹³⁶ The false world created gives them friendship and financial reward but at the same time invades their privacy. Discovering that their new world and friends are fictitious risks going to the core of their psychological well being. It is likely to create resentment of the police, both on the part of the suspect but also often their families. It could also, given the skills and knowledge acquired in the scenarios, lower the suspect's inhibitions if the possibility of engaging in criminal activity arises in the future.

The counter to this concern is that the technique is successful in bringing serious offenders to justice where conventional investigative methods have failed. The rules of fair play regrettably cannot apply in these circumstances. Lamer J in the Canadian Supreme Court case of *R v Rothman* put this argument eloquently:¹³⁷

The investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not ... be hampered in their work.

¹³⁴ The aim of the criminal justice system should be to implement procedures that increase the rate of true confessions while minimising the rate of false confessions and avoiding techniques shown to increase the rate of both true and false confessions: see M Russano and others "Investigating True and False Confessions Within a Novel Experimental Paradigm" (2005) 16 *Psychological Science* 481 at 481 and 484.

¹³⁵ See for example, Moore, Copeland and Schuller, above n 4, at 396

¹³⁶ See Amar Khoday "Scrutinizing Mr Big: Police Trickery, the Confessions Rule and the Need to Regulate Extra-Custodial Undercover Interrogations" (2013) 60 *Crim L Q* 277 at 284–285.

¹³⁷ *R v Rothman* [1981] 1 SCR 640 at 697. This case did not involve a Mr Big-type scenario but rather involved an undercover officer questioning a suspect in custody after he had refused to answer questions. In *R v Hebert*, above n 4, overruled the result in *R v Rothman*.

Exclusion of evidence

Finally, there is the issue of whether the exclusion of evidence is the best way to deal with issues of police misconduct.¹³⁸ Where an individual police officer has acted contrary to normal police standards, it could be thought that individual disciplinary measures might be more efficacious. Even if the police conduct at issue is systemic, it has been argued that individual offenders should not benefit from the courts' wish to mark disapproval of the conduct by having relevant evidence excluded.

The counter argument is that, particularly where there has been a breach of rights, the exclusion of evidence is a proportionate response to vindicate the right. Further, it would bring the administration of justice into disrepute if the courts were to use the fruits of police misconduct.¹³⁹ In addition, the police would not be adequately deterred from such conduct if the result is nevertheless admissible in evidence.¹⁴⁰

Trial issues

If a confession from a Mr Big operation is held to be admissible, the defendant's main problem, assuming he or she wishes to challenge the validity of the confession in whole or in part, will be raising a reasonable doubt as to the truth of the confession. As already discussed, juries tend to place inordinate weight on confessions, even if there is reason to doubt their validity.

This will be exacerbated in a Mr Big situation where, in order to challenge validity, it will be necessary to place at least some evidence before the jury of the suspect's willingness to engage in what could have been quite serious criminal behaviour had it been real. Despite directions to the contrary, there is a risk that jurors will be influenced in their perception, both of the defendant and the evidence, by this "bad character" evidence in circumstances where

¹³⁸ For a thorough examination of the argument in favour of and against the exclusionary rule (albeit in the United States context), see for example H M Caldwell and C A Chase "The Unruly Exclusionary Rule: Heading Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About its Effects Outside the Courtroom" (1994) 78 *Marquette L Rev* 45; and D H Oaks "Studying the Exclusionary Rule in Search and Seizure" (1970) 37 *University of Chicago L Rev* 665; and H M Caldwell "Fixing the Constable's Blunder: Can One Trial Judge in One Country in One State Nudge a Nation Beyond the Exclusionary Rule?" (2006) *BYU L Rev* 1.

¹³⁹ Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992) at 93.

¹⁴⁰ See the discussion by the New Zealand Law Commission, above n 139, at 91–92. It was the New Zealand Law Commission's view that "[w]hile the deterrent effect of the exclusion of confessions and other forms of evidence may well be overstated, those responsible for the conduct of the New Zealand Police certainly endeavour to ensure that police act within the boundaries set by the law and react to judicial rulings accordingly".

normally such evidence would not be admissible. As the majority of the Supreme Court of Canada said in *Hart*, the combination of reliability issues and prejudice makes “for a potent mix – and the risk of a wrongful conviction increases accordingly”.¹⁴¹

The other aspect of Mr Big operations that could decrease even further the willingness of juries to doubt the validity of a confession is the fact that, throughout the operation, the value of honesty has been stressed. Prosecutors are sure to point out that a false confession would go against the values of the organisation the suspect was so anxious to join. The difficulty with this argument is that it is usually made clear to a suspect that the only version that will be accepted as truthful, and therefore in line with the values of the organisation, is a full confession to the crime. As a recent article has said:¹⁴²

Typically, the boss is resolutely unreceptive to denials or exculpatory explanations. ... Consequently, in the inverted moral universe that the operatives have created the confession is in the target’s self-interest ... 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. ... 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 as it did in the gang’s depraved and fictitious fantasy world.

The first concern could be met by the argument that it was the suspect’s choice to become involved in the Mr Big operation and eventually confess. Any prejudice can be mitigated by putting before the jury truncated and sanitised details of the criminal activity¹⁴³ and by strong directions. A less uncompromising view would assess the admissibility of the confession by balancing the extent of the prejudice against the probative value of the evidence.¹⁴⁴

The second concern could be addressed by not allowing prosecutors to make the argument based on honesty to the jury or alternatively (and perhaps additionally)

¹⁴¹ *R v Hart*, above n 15, at [8].

¹⁴² See Moore, Copeland and Schuller, above n 4, at 387–388.

¹⁴³ See *R v Hart*, above n 15, at [107].

¹⁴⁴ This is the first “prong” of the new approach set out by the majority of the Supreme Court of Canada in *R v Hart*, above n 15.

countering it in directions, by pointing out the incentives for even an innocent person to confess and the distorted notion of “truth” in the Mr Big world.

Innovation or threat?

So far each concern with the technique has been examined individually but what about the cumulative effect?

Some would argue that the fact the technique works is key. Under this utilitarian view, in cases of serious crime where conventional methods have failed and with suitable safeguards,¹⁴⁵ the technique could continue. Indeed, it could be argued that this is the more rights-centred approach, particularly taking into account the human rights of victims and their relatives.¹⁴⁶

A further restriction could perhaps be added. Professor Ashworth maintains, albeit in the context of undercover operations generally without the added features of the Mr Big operations, that the consequentiality (“ends justify the means”) approach should not be accepted in full. In his view, any cases that involve “tricks about rights”, including those in any codes of police practice,¹⁴⁷ are wrong and “any attempt to justify [them] in terms of convicting the factually guilty is constitutionally and morally unsustainable”.¹⁴⁸

Others would take a more uncompromising view and call for the technique to be banned altogether, considering the risk of false confessions and the moral threat to the criminal justice system too high a price to pay. For example one commentator, writing after *Hart*, said:¹⁴⁹

Despite all of the red flags and potential for trouble identified – the ‘significant risk of false confessions’ being the worst – Mr. Big operations will continue to be tolerated and used in this country. Why? Here’s the Supreme Court’s bottom line: The technique works. Of course it does. It relies on coercion, inducements and threats. As such, it should be stopped.

¹⁴⁵ Such as those set out in *R v Hart*, above n 15, and the limits now placed on Mr Big operations by the Canadian Police. Some commentators also argue for more independent control over and review of operations and even for prior judicial authorisation: see for example, K Puddister and T Riddell “The RCMP’s ‘Mr. Big’ sting operation: A case study in police independence, accountability and oversight” (2012) 55 Can Publ Adm 385 at 400–405.

¹⁴⁶ See Ashworth, above n 133, at 117–118.

¹⁴⁷ Note the need for a caution (and therefore the rights of suspects in this regard) arises earlier in Hong Kong, England and Wales than it does in Canada and New Zealand.

¹⁴⁸ Ashworth, above n 133, at 138.

¹⁴⁹ Brian Hutchinson “Of course Mr Big confessions work. They rely on coercion, inducements and threats” *National Post* (online ed, 1 August 2014) <www.nationalpost.com>.

The view taken on the legitimacy or otherwise of the Mr Big technique depends on the view taken on the core features of the criminal justice system and the proper limits of police powers. The debate takes place at a four-way intersection: between the private interests of victims and their families; the public interest in bringing offenders to justice; the private interest and right of suspects not to be coerced into confessions; and the public interest in guarding against wrongful convictions, upholding individual rights and enforcing proper standards of police behaviour. The challenge is to achieve the appropriate balance between these fundamental values and the question is whether any of the jurisdictions represented at this symposium has achieved that balance.